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THE ELEMENTS OF CONVEYANCING

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THE ELEMENTS OF CONVEYANCING

HERITABLE RIGHTS

BY

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AND

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PREFACE

THERE is a demand at the present time for a work on Heritable Conveyancing specially adapted for the use of students. I was requested more than once by the publishers of my *Heritable Rights* to allow them to reprint the second edition of that work in order to meet the demand. I considered, however, that a book better suited for students could be produced by abridging the contents of the third edition into a volume which would sufficiently explain the leading principles, common law and statutory, relating to the constitution, the transmission, and the extinction of Heritable Rights. This plan has been adopted; and the work of condensation and, where necessary, of re-writing has been done by my friend, Mr John Bartholomew, Advocate, whose wide and accurate knowledge of conveyancing is well known.

I have read the proof-sheets with care, and have embodied in the text, so far as the scope of the work seemed to require, the results of recent decisions.

Mr Byrom S. Bramwell, Advocate, has given valuable help in the preparation of the book, and he has also compiled the Index.

JOHN CRAIGIE.

9 WEMYSS PLACE,
EDINBURGH, *April* 1908.

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THE ELEMENTS OF CONVEYANCING

HERITABLE RIGHTS

DIVISION I

CHAPTER I

PRINCIPLES OF THE SCOTTISH LAW OF CONVEYANCING; ALIENATIONS OF FEUS; TENURES, ABOLISHED AND EXISTING; ALLODIAL LANDS.

Scottish system of Land Rights based on Feudal System.

Leading feature of Feudal System.

THE system of Land Rights now existing in Scotland is based on the Feudal System.[1] The grand feature of the Feudal System "was," says Professor Menzies, "that it invested the sovereign with the character of original and supreme proprietor of all land subject to his dominion. By him territories were allotted to his more powerful subjects, who subdivided them among their dependents, and these in their turn made subordinate grants, which descended through successive grades to an extent commensurate with the exigencies of the military following down to its lowest rank."[2] Thus, the Crown may feu lands to A, who may sub-feu them to B, who may sub-feu them to C. A, as a vassal, holds directly of the Crown; his immediate superior is the Crown. B, as a vassal, holds directly of A, indirectly of the Crown; his immediate superior is A, his

[1] For origin, history, and modifications of the Feudal System, see Stair, 2, 3, 1 *et seq.*; Ersk. 2, 3, 1 *et seq.*; Ross' Lect., ii. 23 *et seq.*; Menzies, 456 *et seq.*; Bell's Lect. i. 561 *et seq.*; Duff, 43; H.R. 1 *et seq.*

[2] Menzies, 466.

mediate superior is the Crown. C, as a vassal, holds directly of B, and indirectly first of A, then of the Crown; his immediate superior is B, his mediate superiors are first A, then the Crown.

Holder of land may be both a superior and a vassal.

The holder of land may thus be both a vassal and a superior, —a vassal as regards the granter of his right, a superior as regards the grantee to whom he has sub-feued. Unless effectually prohibited by a condition made prior to the commencement of the Conveyancing Act, 1874,[1] subinfeudation may go on *ad infinitum*.

Superior and vassal, *dominium directum*, *dominium utile* and *dominium plenum*

A feudal right granted by the Crown, by a vassal, or by a sub-vassal, does not deprive the granter of his whole legal estate in the lands conveyed. The granter retains the radical right to the subjects feued. The granter of the feudal right is called the superior, because, with regard to his grantee or vassal, he stands in a higher rank; and the interest which is reserved to the granter is called the superiority or *dominium directum*, because it is, in a feudal sense, the more eminent right.[2] The interest which the grantee acquires is called the property, or, as it is the more profitable interest, the *dominium utile*.[3] The right to the *dominium directum* empowers a superior to exact implement of the conditions, express or implied, of his grant The right to the *dominium utile* carries with it the exclusive possession and enjoyment of the lands, so long as the conditions of the grant are fulfilled. The estate of a proprietor of land, although considered as a *dominium utile* in relation to the estate of his superior, is nevertheless called the *dominium plenum* when considered in relation to the separate estates of superiority and property into which it may be divided. The term "fee" is used to indicate the right either to the *dominium directum* or to the *dominium utile*.[4] Thus, it is quite correct to speak of a fee either of superiority or of property.

The term "fee."

Disabilities of superior.

There is this distinction between a fee of superiority and a fee of property, that although it is incompetent for a superior, in the absence of reserved power, or the consent or acquiescence

1 37 & 38 Vict., c. 94, ss. 4 (2) and 22.

2 Ersk. 2, 3, 10.

3 *Ibid.* See also Stair, 2, 3, 7; Duff, 45, 55; Jur. Styles (5th ed.), i. 4.

4 Ersk. 2, 3, 10.

of the vassal to that effect, either to interject a mid-superiority fee between the superiority and the property, or to divide the fee of superiority, yet a fee of property can be alienated by its owner, in whole or in part, to the same or different disponees.[1]

Superior in early times could refuse consent to substitution of stranger for vassal.

Whilst a vassal could in early times grant holdings *de me* or sub-feus, when he was not prohibited from doing so by a condition against subinfeudation,[2] yet he could not substitute a person holding *a me* or a stranger in his place without the consent of his superior.[3] But this rule was first modified, and then abolished. By an Act of Alexander I., the Sheriff was empowered to sell a debtor's lands on fifteen days' notice when his moveables were insufficient to pay his debts, and the purchaser was entitled to hold them of the debtor's superior.[4] This Act having fallen into abeyance, it was successively enacted that creditors-apprisers,[5] adjudgers,[6] and purchasers of bankrupts' lands at judicial sales[7] should be entitled to an entry with the superiors on payment of a year's rent of the lands. After the passing of the Acts 1469, c. 36, and 1672, c. 19, purchasers often adopted the course of first going through the form of apprising or adjudging the seller's lands, and then of demanding, as creditors-apprisers or adjudgers, entry from the superiors.[8] Even before the passing of the Acts 1672, c. 19, and 1681, c. 17, "the Crown, under a sense of the unsuitableness of the feudal fetters to the exigencies of advancing freedom and commerce, had adopted a liberal course towards its vassals, having laid down the rule, as appears from 1578, c. 66, to grant confirmation upon payment of expenses by the party."[9] Another statute (1685, c. 22), which first legalised entails, made it lawful "to His Majesty's subjects to tailzie their lands and estates, and to substitute heirs in their tailzies." The state of the law against alienation, as opposed to subinfeudation, led also at an early period to another device by which its effect in practice was modified, namely, the granting of two deeds—one containing

Creditors-apprisers by 1469, c. 36; adjudgers by 1672, c. 19; and purchasers of bankrupts' estates by 1681, c. 17, entitled to demand entry with superior.

Disponee obtained two deeds, the one with an obligation to infeft *de me*, the other

1 See p. 138, *infra*.
2 See Ersk. 2, 3, 13.
3 See Menzies, 582; Bell's Lect. i. 682.
4 Thomson's Acts of Parliament, i. 735; Bell's Lect. i. 571.
5 1469, c. 36.
6 1672, c. 19.
7 1681, c. 17, and see 1690, c. 20.
8 See Bell's Lect. i. 572.
9 Menzies, 584.

with an obligation *a me*, and afterwards one deed with an obligation *a me vel de me*, as a device for evading law preventing alienation.

an obligation to infeft *de me*, *i.e.* to be held of the granter, and the other containing an obligation to infeft *a me*, *i.e.* of the granter's superior. On these two deeds an instrument of sasine which could by its terms be held to proceed on either was expede. The grantee held the *dominium utile* under the *de me* disposition until the *a me* disposition was confirmed by the superior, when he stepped into the place of the granter as vassal of the superior. The *de me* disposition was then dropped from the progress of titles. Later the two dispositions came to be combined in one, with an alternative manner of holding *a me vel de me*. The right of a grantee infeft was ascribed to the *de me* holding until the disposition was confirmed by the superior, when the grantee's right was ascribed to the *a me* holding. A mid-superiority was created in favour of the granter by the infeftment of the grantee, which, however, disappeared on the superior's granting confirmation.[1] By the Act 20 George II., c. 50, a disponee who obtained from a former proprietor or vassal duly vested in the lands a conveyance containing a procuratory of resignation was empowered to charge the superior to grant him an entry by resignation. By the Lands Transference Act, 1847,[2] a disponee who obtained a conveyance containing an obligation to infeft *a me* or *a me vel de me* was empowered to charge the superior to grant him an entry by confirmation. Since 1874 entry with the superior by means of resignation or of confirmation is incompetent, infeftment implying entry with the superior.[3]

Power of disponee to charge superior to enter him under 20 Geo. II., c. 52.

Under Lands Transference Act, 1847.

Tenures.

Different feudal tenures recognised by the law of Scotland.

Feudal grants have, according to the law of Scotland, been distinguished from one another according to the different tenures or manners of holding under which they have been held. The following are the tenures or holdings which have been recognised in our system of conveyancing:—I. WARD; II. SOCCAGE; III. MORTMAIN OR MORTIFICATION; IV. FEU; V. BLENCH; VI. BURGAGE; VII. BOOKING. The tenures of Feu, Blench, Burgage, and Booking are the only tenures which now exist.

1 See H.R. p. 9.
2 10 & 11 Vict., c. 48.
3 37 & 38 Vict., c. 94, s. 4.

I. WARD.—The most ancient feudal tenure was that by military service.[1] This tenure was called sometimes *feudum rectum* or *feudum militare*, but usually ward-holding, from the fact that during the minority of a vassal his superior was entitled to the guardianship of his person as well as the management of his affairs. Although the *reddendo* in charters of ward lands was properly services, yet a sum of money as well as the services might also be stipulated for.[2] Even after feus came to be granted for payment of an annual sum, or for the delivery of grain, or for the performance of yearly services, not of a military nature, the tenure was still considered ward, provided the charter did not express that the prestations under it were in name of feu-farm or blench-farm.[3]

I. Tenure of ward, or tenure by military service.

Feudal grants *in dubio* were presumed to be ward.

The casualties peculiar to ward-holding were—(*a*) *Ward*; (*b*) *Recognition*; and (*c*) *Marriage*. In common with feu and blench holdings, ward-holding involved other casualties, such as non-entry, relief, and liferent escheat.[4]

Casualties of ward-holding—(*a*) Ward; (*b*) Recognition; and (*c*) Marriage.

The superior was, in respect of the casualty of *ward*,[5] entitled to the full rents of the estate of a vassal who died leaving a minor as his heir, until such heir, if a male, attained majority, or if a female, attained the age of fourteen. The reason of this casualty was that the heir was considered unfit, if a male, to bear the fatigue of war until he had attained majority, or if a female, to marry, and so provide a husband capable of serving the superior, until she had attained the age of fourteen.[6] In the case of co-heiresses, ward ceased when the eldest co-heiress attained the age of fourteen.[7] Ward also ceased if a male heir was found guilty of treason, because treason involved a forfeiture of his estate to the Crown.[8] Sometimes, in the *reddendo* of a charter, it was stipulated that all the superior should be entitled to demand in name of ward should be a fixed annual sum during the minority of the heir.[9] In this case the casualty was called *Taxed Ward*.

Ward, simple or taxed.

1 Ersk. 2, 4, 2.
2 *Williamson*, M. 16,559; *Carnwath*, M. 16,564.
3 Ersk. 2, 4, 2.
4 Ersk. 2, 5, 5; 2, 5, 29.
5 Bell's Lect. i. 564.
6 Ersk. 2, 5, 9.
7 Ersk. 2, 5, 9; Ersk. Prin. 2, 5, 4.
8 Ersk. 2, 5, 9.
9 Ersk. 2, 5, 5.

Recognition.

When a vassal in lands held by simple ward or taxed ward alienated without the superior's consent more than a half of them to anyone other than the person *alioqui successurus*,[1]—*i.e.* the person who, if he or she survived the vassal, would, apart from the alienation, have succeeded to him,—he thereby forfeited the whole of the lands to his superior. This forfeiture received the name of *Recognition*.[2] The casualty of recognition was introduced in order that, if a vassal by alienating his lands disabled himself from performing the feudal services, the superior might have it within his power to name an efficient vassal.[3]

Marriage.

In virtue of the casualty of *marriage* a superior of ward lands was entitled to receive from the unmarried heir, male or female, of his vassal, after such heir had attained the age of puberty, a certain sum as the avail or value of the tocher which the heir might reasonably have been expected to receive from his or her marriage.[4] In the case of heirs-portioners only one casualty was due.[5] The casualty of marriage was not exigible when the heir was married prior to the death of the vassal.[6] The avail was either (*a*) *Single*, (*b*) *Double*, or (*c*) *Taxed*. The single avail was computed originally at three years', and afterwards at two years', free rent of the vassal's lands.[7] The express consent of the superior to the heir's marriage was latterly held to imply a discharge of the casualty,[8] but the casualty was not discharged simply by the heir's marrying the lady chosen by the superior. The double avail was exigible when the heir not only refused to marry a woman offered to him by the superior, but also married another without his consent.[9] The double avail was at first computed at two single avails; but Erskine states that, if the value of it had been brought into dispute in later times, it would have been fixed at not more than three years' free rent of the vassal's estates.[10] In some charters the casualty of marriage was a fixed sum; and, when that was so, the avail was said to be taxed.[11] Although a vassal held lands

Avail—(*a*) Single; (*b*) Double; or (*c*) Taxed.

1 Ersk. 2, 5, 16.
2 Ersk. 2, 5, 10–17; Bell's Lect. i. 566.
3 Ersk. 2, 5, 10.
4 Ersk. 2, 5, 18; Bell's Lect. i. 565.
5 Stair, 2, 4, 56; Ersk. 2, 5, 19.
6 Ersk. *ibid.*; Stair, 2, 4, 53.
7 Ersk. 2, 5, 20; Bell's Lect. i. 565.
8 Ersk. 2, 5, 19.
9 Ersk. 2, 5, 21.
10 Ersk. 2, 5, 21.
11 Ersk. Prin. (19th ed.) 2, 5, 8.

ward of different superiors, the casualty of marriage was due only to his eldest superior. By "eldest" superior was meant the Crown, when the vassal held any ward lands of the Crown; or when the vassal held no ward lands of the Crown, that superior from whom his ancestors in blood had obtained the first grant by the tenure of ward.[1] The casualty of marriage, although not due *ex lege* in any tenure but ward, was sometimes stipulated for in a feu-right, in which case the tenure was sometimes called the tenure of feu *cum maritagio*.[2]

"Eldest" superior.

Feu *cum maritagio*.

By 20 George II., c. 50, the tenure of ward and the casualties peculiar to it—ward, recognition, and marriage—were abolished.[3] By this Act[4] the tenure of ward lands held of the Crown was converted into blench-holding for payment of one penny Scots at the term of Whitsunday yearly, and the tenure of ward lands held of a subject superior was converted into feu holding for payment of a feu-duty in money, victual, or otherwise, the amount of which was to be determined by means of rules to be fixed in an Act of Sederunt of the Court of Session.[5] This statute also abolished the casualty of marriage in feus *cum maritagio* and clauses *de non alienando sine consensu superiorum*, and allowed superiors to apply to the Court to modify such additional feu-duty as the Court should judge a reasonable recompense for this abolition. Further, the Act abrogated an ancient usage by which vassals of the Crown or of subject superiors were obliged to give suit and presence or to appear at head Courts at certain times of the year.

Ward and its casualties abolished.

Two other feudal casualties, now obsolete (which, however, were not confined to the tenure of ward), were Disclamation and Purprestur (or purprision). By these a vassal forfeited his whole feu to his superior. Disclamation was incurred by a vassal's disowning, without probable ground, his superior's right to any part of the feu;[6] and purprestur was incurred by a vassal's encroaching on any part of his superior's property.[7]

Disclamation and Purprestur.

[1] Ersk. 2, 5, 22; Mackenzie's Inst. 2, 5, 12.
[2] Ersk. 2, 5, 23; Bell's Lect. i. 573.
[3] S. 1.
[4] For summary of Act, see H.R. p. 18.
[5] A.S., Feb. 8, 1749.
[6] Stair, 2, 11, 29; Ersk. 2, 5, 51; Ersk. Prin. 2, 5, 37.
[7] Stair, 2, 11, 30; Ersk. 2, 5, 52; Ersk. Prin. 2, 5, 37.

II. Tenure of Soccage.

II. Soccage.—When a grant of land was made on condition of the vassal's cultivating other land belonging to the granter, instead of performing military services, the tenure was called *Soccage*.[1]

III. Tenure of Mortmain or Mortification.

III. Mortmain or Mortification.—When feudal subjects are granted to churches, or other societies for religious or charitable purposes, they are said to be mortified or granted *ad manum mortuam*. The reason for this is probably that subjects mortified are held by a dead hand which cannot transfer them. The term in its strictest sense applies to the system, abolished at the Reformation, of giving to the Church grants of land, the consideration for which was prayers and masses for the souls of the granter and his friends.[2]

IV. Tenure of Feu.

IV. Feu.—Of the existing tenures, the most common and most important is *feu-farm*, or, as it is now more commonly called, *feu*. The *reddendo* in grants of lands held by the tenure of feu is now most frequently the payment of a sum of money annually in name of feu-duty. It was not unusual at one time to stipulate in such grants for the performance by the vassals of personal services similar to those implied under ward-holding. These services were known as hosting and hunting, and were obligations on the vassal to attend the superior in wars and commotions, and at frays and followings.[3] But clauses stipulating for the services of hosting and hunting were rendered null by the Clan Act of 1715.[4] In lieu of such services contracted for before the Act, annual payments were fixed either by the parties, or by the Court of Session when the parties themselves could not agree on a sum.[5] The Act did not make illegal the exaction of services which were either not strictly personal or merely *quasi* military.[6]

Most common *reddendo* under feu-rights.

Services of hosting and hunting in grants of lands held feu abolished by Clan Act, 1715.

Prior to the commencement of the Conveyancing Act, 1874, parties could make such arrangements as they pleased regard-

[1] Ersk. 2, 4, 5; Duff, 53; Bell's Lect. i. 569.

[2] See Ersk. 2, 4, 10–11; Duff, 51; Bell's Lect. i. 570.

[3] See Bell's Lect. i. 573 *et seq.*

[4] 1 Geo. I., Stat. 2, c. 54; and see 20 Geo. II., c. 43 and c. 50.

[5] Ss. 10-12.

[6] See p. 56, *infra*.

ing the nature of the feu-duty to be paid. In feus granted after the commencement of the Act the annual feu-duty must be of fixed amount or quantity; but in such feus it is competent to stipulate for a permanent periodical increase or reduction of the feu-duty, provided that the amount thereof is certain, and that the time or times at which such increase or reduction is to have effect are also certain.[1]

In feus granted after 1st October 1874 feu-duty must be of fixed amount or quantity.

The tenure of feu was introduced to encourage the proper cultivation of the soil. As agriculture was neglected under a system by which vassals held their lands of the superior in return for military services only, owners of property gave grants of land on condition that the grantees should, instead of serving in war, cultivate and sow the lands which the granters themselves kept in their own natural possession.[2] As already stated, this sort of holding was called soccage. These agricultural services came to be replaced by payments of corn and cattle, and eventually in many cases by payments in money. In this way the tenure of feu arose.

Why and when the tenure of feu was introduced.

V. Blench.—*Blench* (or *blanch*) is that tenure by which a vassal holds his lands for an elusory yearly duty, which may consist either of money, as a penny Scots, or of some other subject, as a pound of pepper. The *reddendo* in a blench charter may stipulate for payment or fulfilment of the duty simply, or for payment or fulfilment of the duty *si petatur* or *si petatur tantum*. If the *reddendo* stipulates simply for payment or fulfilment, the duty, if it is a thing of yearly growth, cannot be exacted unless it is demanded within a year after it becomes payable in terms of the *reddendo*; but if it is not a subject of yearly growth, it can be exacted at any time within the years of prescription. If, on the other hand, the *reddendo* stipulates for payment or fulfilment of the duty *si petatur* or *si petatur tantum*, the vassal is relieved from the annual duty stipulated for, whether it is a thing of yearly growth or not, if it is not demanded within the year. As by section 3 of the Conveyancing Act, 1874, the word "feu" includes "blench," and

V. Tenure of Blench.

[1] 37 & 38 Vict., c. 94, s. 23; and see p. 55, *infra*.

[2] Ersk. 2, 4, 5.

the word "feu-duty" includes "blench-duty," the annual duty in grants, made after the commencement of the Act, of land to be held by the tenure of blench must be of fixed amount or quantity, but it is competent to stipulate for a permanent increase or reduction of the duty if the amount thereof is certain, and if the time or times at which such increase or reduction is to have effect are also certain.[1] The casualties incident to the tenure of blench are the same as those incident to the tenure of feu.

The *tenendas* or tenure in a blench-charter formerly bore to be *in libera alba firma*. The *tenendas* in the blench-charter in its modern form bears to be in blench-farm; and even although the *reddendo* in a charter bears that the duty under it is payable *si petatur* or *si petatur tantum*, the tenure is to be accounted not blench but feu, unless the duty is expressed to be payable *nomine albæ firmæ*,—in name of blench-farm.[2]

VI. Tenure of Burgage.

VI. BURGAGE.—The tenure of burgage is that by which Royal Burghs hold of the Sovereign the houses and lands that lie within the limits of their several charters of erection. The Sovereign may be regarded as superior either of each proprietor, or, as some think, of the burgh composed of individual burgesses.[3] The service, expressed or implied, in the charters of Royal Burghs is watching and warding. There are not, and never were, any casualties due under this tenure. Prior to the Conveyancing Act, 1874, the Magistrates in granting entry acted as the Sovereign's bailies specially authorised by the Act 1567, c. 27. Although, before 1874, Magistrates of a Royal Burgh could feu portions of the lands within the burgh, it was a subject of dispute whether private proprietors of burgage lands could grant feus thereof. They can do so now—*i.e.* since 1874.[4]

VII. Ten of Booking peculiar to Paisley.

VII. BOOKING.—This tenure is peculiar to the burgh of Paisley. Formerly conveyances of land held by this tenure, contained, in place of an obligation to infeft, an obligation "to

1 37 & 38 Vict., c. 94, ss. 3 and 23.

2 Ersk. 2, 4, 7; Stair, 2, 3, 33; Duff, 49.

3 Bell's Lect. ii. 793; Menzies, 479, 845.

4 37 & 38 Vict., c. 94, s. 25; and see p. 163 *infra*.

book and secure." Prior to the Titles Acts of 1860[1] and of 1868,[2] such conveyances were followed by minutes of booking, of which extracts were given out by the town-clerk, who keeps the Register of Booking. After these Acts, they could be recorded with a warrant of registration in the Register of Booking. Now conveyances of land held by the tenure of booking may be in the same form as those of lands held in feu; but all writs relating to lands in the burgh of Paisley, held prior to the Conveyancing Act, 1874,[3] by the tenure of booking, must still be recorded in the Register of Booking.

Allodial lands.

ALLODIAL LANDS.—By the expression "allodial property" is meant property which is held of no superior. In addition to moveables (which are always allodial), the following heritable subjects fall to be included under allodial property:—(1) *Crown Property.*—This includes the superiority of lands belonging to subjects in property; the rights reserved to the Crown out of lands feued to subjects, *e.g.*, mines of gold, salmon fishings, etc.; and the Sovereign's lands, castles, strongholds, and palaces.[4] (2) *Principality of Scotland.*—This consists of lands belonging to the Sovereign's eldest son, as Prince and Steward of Scotland, and to the Sovereign when there is no prince.[5] (3) *Church Property.*—Churches, churchyards, manses, and glebes, a title to which is created by the designation of the presbytery.[6] (4) *Udal Property.*—This comprehends those lands within the islands of Orkney and Shetland which have not been feudalised by the proprietors of them obtaining a charter from the Crown.[7] (5) *Lands acquired by railway or other companies under the compulsory powers conferred by the Lands Clauses Consolidation Act, 1845,*[8] *to which a title is completed under section 80 of the Act.*

1 See s. 23.
2 See s. 152.
3 S. 25.
4 Bell's Prin. 667 *et seq.*
5 Bell's Prin. 674.
6 See Duncan's Parochial Ecclesiastical Law, p. 364.
7 See *Rendall*, 15 S. 265; *Beatton*, 10 S. 286; Bell's Prin. 932-933; and see *Spence*, 31 S.L.R., 904; and *Smith*, 5 F. 680.
8 8 & 9 Vict., c. 19, ss. 80, 126; and see *Magistrates of Elgin*, 11 R. 950; *Magistrates of Inverness*, 20 R. 551.

CHAPTER II

FEU-CHARTER AND INFEFTMENT IN THE OLDER FORMS

How legal fee formerly constituted.

BEFORE dealing with the feu-charter in its modern form, and with the mode of infeftment (or of getting a real right thereunder) now in use, it is necessary to show how the feudal relationship of superior and vassal was formerly constituted.

I.—CHARTER AND INFEFTMENT PRIOR TO THE INFEFTMENT ACT, 1845.

Proper investiture.

For the constitution of the relationship of superior and vassal no writing was, by our earliest customs, required. At first a proprietor himself delivered, on the lands and in the presence of his vassals (called *pares curiæ*), or at least two of them, a portion of the lands, as representing the whole, to his grantee, and the grantee took the oath of fidelity. On this being done, the granter and the grantee became respectively superior and vassal. In the course of time it became the practice for the granter, after possession had been given to the grantee in the manner described, to give a written declaration of the grant, which was called *breve testatum*, and to which the granter and the witnesses appended their seals. Instead of a *breve testatum* sealed by the granter and the witnesses, a certificate of a notary public, or of two witnesses from among the granter's vassals, was sometimes given as an attestation of the delivery of possession to the grantee.[1] The form of constituting the feudal relationship above described was called the *proper investiture*, because possession was given by the granter *in propria persona*. The *breve testatum* is the foundation of the modern charter.

Breve testatum.

[1] Bell's Lect. i. 577.

Improper investiture.

As it was often inconvenient for the granter to attend personally on the lands, the practice was introduced of executing the *breve testatum* prior to delivery of possession, and of directing it to the granter's commissioner or bailie as a warrant to give possession to the grantee. The bailie, after giving delivery of the lands to the grantee, either sealed the *breve testatum* in attestation of the delivery, or wrote out and sealed a separate declaration of the fact. On account of delivery having been given, not by the granter *in propria persona*, but by his commissioner or bailie, this form of creating the feudal relationship was called *improper investiture*. The declaration given by the bailie in improper investiture is the foundation of the instrument of sasine.[1]

Charter with separate precept and then charter containing precept.

Both proper investiture and improper investiture were superseded, after the beginning of the fifteenth century, by a new method of constituting the feudal relationship, viz. the granting of a formal charter. At first a separate precept for infeftment or warrant to the granter's bailie accompanied the charter; and this practice continued for fully two centuries. But by the Statute 1672, c. 7, it was enacted that all precepts for charters granted by the Crown should be engrossed towards the end of the charters themselves. This provision soon gave rise to the invariable custom of embodying precepts of sasine in charters which were granted by subject-superiors.[2]

How feudal relationship constituted prior to the Infeftment Act, 1845.

The steps necessary for constituting the feudal relationship were, for many years prior to the commencement of the Infeftment Act, 1845, (*a*) the granting of the charter; (*b*) symbolical delivery, by the appropriate symbols, on the ground of the lands disponed by the charter; and (*c*) the expeding by a notary of an instrument of sasine in favour of the grantee; and (*d*) the recording of it within sixty days of its date either in the General Register of Sasines or in the Particular Register of Sasines appropriate to the lands.

Charter prior to the Infeftment Act, 1845.

The charter in the form used prior to the Infeftment Act, 1845, contained these clauses:—

[1] On proper and improper investiture, see Ersk. 2, 3, 17; Bell's Lect. i. 576-7.

[2] Ersk. 2, 3, 33.

(1) Narrative clause, containing the names and designations of both the granter and the grantee, as well as the cause of granting. (2) Dispositive clause, containing the words of conveyance, the destination to heirs, the description of the subjects, the reservations, conditions, provisions, burdens, and limitations of the grant. (3) Clause of *tenendas*, expressing the manner of holding. (4) Clause of *reddendo*, setting forth the feu-duty and other prestations. (5) Clause of warrandice. (6) Assignation to writs and rents. (7) Clause of warrandice of that assignation. (8) Obligation to free the subjects of public burdens. (9) Clause of registration for preservation. (10) Precept of sasine. (11) Testing clause.

The charter of sasine, originally written in Latin,[1] came latterly to be frequently written in English.[2]

Precept executive clause of charter.

Of the clauses of the charter it is here necessary only to notice in detail the precept of sasine, as the import of the rest will appear in the sequel. The precept of sasine was the executive clause of the charter. It required (1) to contain a mandate to give delivery or sasine to the disponee, who had to be identified;[3] and (2) to define in itself, or by reference to other parts of the deed, the lands disponed, which had to be described or identified so that they could be ascertained.[4]

Essentials of precept.

Classification of precepts—

Precepts may be classed as follows:—(*a*) General[5] or special,[6] (*b*) unexhausted or exhausted,[7] and (*c*) definite or indefinite.[8]

(*a*) General and special.

A general precept is one authorising infeftment in fee, whereas a special precept authorises infeftment in something short of a fee, *e.g.*, in security or in liferent. On the ground that the greater includes the less, a general precept authorises a sasine in security,[9] or in liferent,[10] or in fee under the fetters of an entail.[11]

(*b*) Unexhausted and exhausted.

A precept is said to be unexhausted until it is duly executed, and exhausted when it is duly executed. The full execution of a precept implies the due infeftment, to the full

1 For form in Latin, see H.R. p. 32.
2 For form in English, see H.R. p. 34.
3 Bell's Prin. 768, 876; Bell's Lect. i. 646.
4 Bell's Prin. 876.
5 *Ibid.* 876.
6 *Ibid.* 877.
7 *Ibid.* 879.
8 *Ibid.* 818; Bell's Lect. i. 692.
9 *Mitchell*, M. 14,335; 2 Ross' L.C. 418; *Bonthrone*, Hume, 238, 2 Ross' L.C. 421; *Melvin*, 5 D. 1217.
10 *Graham's Children*, M. 6931.
11 *Lord Napier*, M. 15,418; aff. 2 Pat. 108.

extent of the precept,[1] of the person in whose favour it is conceived, or of one in his right, as, *e.g.*, his heir or assignee. Accordingly, if an instrument of sasine was not recorded,[2] or, for example, was recorded in the wrong register,[3] the precept remained in force, and a valid infeftment could be expede in virtue of it. A definite precept is one which is limited to one manner of holding; whereas an indefinite precept is one which is applicable to more than one manner of holding. In the feu-charter the manner of holding is and has always been *de me*, and consequently the precept of sasine in such a deed is definite. In a disposition of a fee, before the commencement of the Conveyancing Act, 1874, there might be an alternative holding *a me vel de me*, in which case the precept of sasine, because it is applicable to either holding, is said to be indefinite. It was not essential that the precept should specify the symbols of delivery, although it usually did so.[4]

(c) Definite and indefinite.

Symbols in precept.

Precepts of sasine could not, prior to 1693, c. 35, be used after the death of the granters or grantees of them. That Act, however, made it competent to use a precept of sasine for the infeftment of the person in whose favour it was granted, or his heirs, assignees, and successors, even after the death of the granter or grantee, or of both, provided that the titles of the person to whom sasine was granted were expressed and deduced in the instrument of sasine. A precept of sasine cannot be assigned by the granter of it, even although he has power to revoke the deed in which it is contained.[5]

After 1693, c. 35, precept of sasine could be used after as well as before death of granter and grantee thereof.

Precept cannot be assigned by granter.

There were three leading principles on which the law regarding the taking of infeftment was originally based:—(1) That the property had to be delivered by the disponer to the disponee, according to the maxim *traditionibus non nudis pactis transferuntur rerum dominia*; (2) that the only evidence of delivery was an instrument of sasine, and thence arose the maxim *nulla sasina nulla terra*; and (3) that instruments of sasine, to divest the former proprietor and invest the disponee, had to be duly

Principles of Infeftment:—(1) Symbolical delivery, (2) Sasine, and (3) Registration of Sasine.

[1] See, *e.g.*, *Guthries*, 3 Br. Sup. 140, and *Moncrieff*, 8 S. 416.

[2] *Kibble*, 9 S. 233; aff. 5 W. & S. 553, 2 Ross' L.C. 109; *Young*, 6 D. 370, 9 D. 932; aff. 2 Ross' L.C. 81.

[3] *Town-Council of Brechin*, 3 D. 216, 2 Ross' L.C. 111.

[4] *Barstow*, 20 D. 612.

[5] *Gammell*, 12 D. 19; and see *Mackilligin*, 18 D. 83; *Porterfield*, 8 S. 16.

registered in the appropriate register of sasines. At first, when proper investiture existed, there was, as has been explained, no need for any writing in a transference of property. Then came the time of improper investiture when the *breve testatum* was used. But at a very early date these investitures were superseded by an instrument of sasine under the hand of a notary public, which remained until 1858 a necessary solemnity for the completion of a feudal right of property in the disponee. Before instruments of sasine were introduced possession was necessary to give a real right to lands,[1] but after instruments of sasine came into use they became the necessary solemnities to instruct such right, and their place could not be supplied by any other means of probation.[2] Registration was introduced as a means of preventing frauds in connection with the alienation of land, the Act 1617, c. 16, being the most important of the Acts which established the system. It follows, from the combined need of an instrument of sasine and registration thereof for the completion of a real right in land, and from the terms of the Act of 1617, that an instrument of sasine unrecorded is null,[3] although the granter of the warrant and his heirs cannot plead the nullity;[4] that an instrument of sasine, with an omission *in essentialibus*, although recorded, is also null, as an inept infeftment is equal to no infeftment;[5] and that the nullity of an unrecorded sasine is not cured by prescription, as prescription does not cure an intrinsic nullity in a right.[6]

Ceremony of symbolical delivery.

Disponee's attorney; disponer's bailie; notary public and two witnesses present.

At the ceremony of symbolical delivery five persons appeared—(1) an attorney on behalf of the disponee; (2) the disponer's bailie; (3) a notary public; and (4 and 5) two witnesses. The disponee's attorney produced the charter containing the precept of sasine, delivered it to the disponer's bailie, and requested him to deliver sasine of the lands. The bailie then handed the deed to the notary public to be read and

[1] Stair, 2, 3, 16; Ersk. 2, 3, 33.

[2] Stair, 2, 3, 16; and see Ersk. 2, 3, 34; Bell's Lect. i. 649.

[3] *Young*, 6 D. 370, 1847, 9 D. 932; aff., 2 Ross' L.C. 81; and other cases in H.R. p. 42.

[4] *Simpson*, M. 13,553; *Gray*, M. 13,540; and see 1617, c. 16.

[5] *Davidson*, 6 S. 8, 2 Ross' L.C. 65; *Macintosh*, 4 S. 190, 2 Ross' L.C. 75.

[6] *Crawford*, 2 Ross' L.C. 112.

published. The notary public, having done so, returned the deed to the bailie. The bailie thereupon delivered the symbols, appropriate to the subjects, to the attorney. The attorney, putting a piece of money into the notary's hands, declared that he took instruments, and called the attention of the witnesses to the fact that he had done so. The whole ceremony was performed on the ground of the lands of which delivery was given.[1] After the ceremony of symbolical delivery the notary public expede an instrument of sasine[2] in favour of the person to whom the delivery had been made.

Instrument of sasine before Infeftment Act, 1845.

The instrument of sasine consisted of the following parts:— (1) *Invocation.* (2) *Clause setting forth day, month, and year of our Lord and of the reign of the Sovereign when symbolical delivery was given.* Although it seems never to have been authoritatively settled that both dates were essential, it was held that when both were given they had to correspond, and that, even although both were given and corresponded, yet if one was written on an erasure the instrument was inept. (3) *Clause setting forth the appearance (in presence of notary public and of the witnesses) of disponer's bailie and disponee's attorney on the ground of the lands.* The instrument required to bear that the ceremony took place on the ground of the lands disponed. When the charter or other deed of conveyance contained different lands, which were either locally discontiguous or legally distinct, symbolical delivery had to take place on each of the different lands, and the instrument set forth the appearance of the notary public, the witnesses, the attorney, and the bailie on the ground of the lands described in the instrument respectively and successively. Lands are deemed legally distinct when they are held (*a*) by different tenures; (*b*) by different titles, even of the same superior; or (*c*) of different superiors. Separate acts of symbolical delivery were also necessary when the deed contained, in addition to lands, other separate tenements (*e.g.* salmon fishings) for which earth and stone were not the appropriate symbols. When, however,

Clauses of instrument:—

(1) Invocation.

(2) Day, month, and year of our Lord and reign of the Sovereign.

(3) Appearance, in presence of notary public and witnesses, of bailie and attorney.

When lands locally discontiguous or legally distinct, symbolical delivery necessary on each.

When lands were legally distinct.

[1] Bell's Lect. i. 650-1.

[2] For form in Latin, see H.R. 42; in English, see H.R. 44.

lands either locally discontiguous or legally distinct, or lands with teinds, fishings, etc., had been erected into a barony, delivery could be made by using the symbols of earth and stone for the lands and other subjects at the place appointed by the charter of barony, or, if no place was so appointed, then on any part of the lands. Further, the Crown could, by a clause of union in a charter, unite subjects lying locally discontiguous, or requiring different symbols for delivery; and if in the clause of union a place for delivery was appointed, delivery took place there, but if no such place was appointed, delivery could be given on any part of the united lands. If part of the lands included in a charter containing a clause of union, or part of the lands of a barony, was disponed, both the part retained and the part disponed had the benefit conferred by the union. When lands were neither erected into a barony nor united by a clause of union, the symbols for teinds were delivered on the ground of the lands: those for fishings at the fishing station; those for rights of patronage within the parish church; and those for mills within the mills.[1] (4) *Clause setting forth production of charter by attorney, the names of disponer and of disponee, and the subjects disponed.* (5) *Clause setting forth exhibition of charter by attorney to bailie, and request by attorney to bailie to execute the office of bailiary.* (6) *Clause setting forth delivery by bailie to notary public of charter to be read and published to the witnesses, and fact of reading and publishing.* (7) *Clause setting forth* ad longum *precept of sasine and testing clause of charter.* Although the omission of the precept of sasine did not necessarily invalidate the instrument, the rule was that the precept should be inserted, it being, however, sufficient to insert as much of the precept, if it contained a description of different lands, as related to that part of them in which infeftment was taken. The testing clause was engrossed *verbatim*, in order to connect the warrant produced as the deed of the granter with the delivery given in pursuance of it. If the person in whose favour infeftment was granted was not the original grantee, but his heir or successor,

Clause of union.

(4) Production of charter, etc.

(5) Exhibition of charter, etc.

(6) Delivery, reading, etc. of charter.

(7) Precept of sasine and testing clause of charter.

[1] For authorities see H.R. 47–49.

the connecting writs had also to be deduced. (8) *Clause setting forth delivery by bailie to dispone of heritable state and sasine, real, actual, and corporal possession, of the lands disponed, and that by delivery to his attorney of earth and stone (or other appropriate symbols) of the ground of the lands.* An instrument of sasine has been held invalid, which, although it set forth the delivery of the appropriate symbols, did not contain that part of the instrument bearing that heritable state and sasine, real, actual, and corporal possession had been delivered.[1] The specification of a wrong symbol was fatal to an instrument.[2] (8) Sasine.

The appropriate symbols were—for land and its accessories earth and stone; for salmon fishings, net and coble; for a mill, when a separate tenement, clap and happer; for teinds, a handful of grass and corn; for annual rent of money, one penny money; for annual rent of victual, a parcel of corn or victual; for a right of ferry, an oar and some water; for a loch, a drop of water; for the right of patronage of a parish church, a psalm-book and the keys of the church; for houses held burgage, hasp and staple, and sometimes earth and stone as well as hasp and staple; and for jurisdictions, the book of Court. For a barony, including subjects of various kinds, the symbols of earth and stone were sufficient. Symbols for different classes of subjects.

(9) *Clause setting forth the taking of instruments by attorney in the hands of notary public.* (10) *Clause setting forth that the ceremony was performed between specified hours of the day on the ground of the lands in the presence of the witnesses.* The object of specifying the hours was to show that the ceremony was performed by daylight. (9) Taking of instrument. (10) When ceremony took place.

(11) *Notarial docquet in Latin, setting forth the notary's name and diocese, his appointment, his presence at ceremony, his seeing, knowing, and hearing the facts narrated in the instrument.* Whilst the body of the instrument could be written by anyone, this docquet had to be holograph of the notary public. (11) Notaria docquet.

The instrument required to be signed by one notary and two witnesses. When the deed consisted of more than one sheet, the pages had to be numbered, and the notarial docquet had to set forth the number of pages of which the deed consisted, (12) Signatures of notary and witnesses.

[1] Davidson, 653; 2 Ross' L.C. 65.

[2] *Town-Council of Brechin*, 3 D. 216.

and each leaf had to be signed by the notary and by the witnesses, because the witnesses were witnesses to the facts narrated in the instrument.[1]

Registration.

The law relating to registration was the result of a long series of Acts.[2] Between 1756 and 1845 the essentials of registration of an instrument of sasine relating to subjects not held burgage were as follows :—(1) *The entry in the minute-book of the instrument within sixty days of its date, the minute of entry being signed by the keeper of the record (or his depute) and the presenter of the writ.* An instrument of sasine was held as recorded from the time when it was entered in the minute-book, although the engrossing did not take place until after the sixty days ; and if several instruments of sasine, all affecting the same subjects, were lodged at the same time, the one first entered in the minute-book was preferred, in the absence of a clause to the effect that they were to be ranked *pari passu*. (2) *Transcription of the instrument of sasine* ad longum *in the General Register of Sasines, or in the Particular Register of Sasines applicable to the lands contained in it.* Any essential error in the record, or an erasure or other vitiation in a material word or clause in the record, if not authenticated, was fatal to the validity of the instrument. With regard to erasures unauthenticated in instruments of sasine, the common law was applicable until the passing of the Act 6 & 7 Will. IV., c. 33, which enacted that no challenge of any instruments of sasine or of resignation *ad remanentiam* (exclusive, however, of instruments of sasine or of resignation and sasine *propriis manibus*) should receive effect either by reduction or by exception, on the ground that any part of the instrument was written on an erasure, unless it should be averred and proved that such erasure had been made for the purposes of fraud, or the record thereof was not conformable to the instrument as presented for registration. The rule was that the record could not be altered after the expiry of the sixty days, though the Court has, under the reservation of the rights of third parties, allowed an

Entry in minute-book.

Transcription in register.

[1] 1686, c. 17 ; see *Carnegie*, M. 8858. For cases on this paragraph, see H.R. 46 *et seq.*

[2] These Acts are dealt with in H.R. 55 *et seq.*

omission in one or two cases to be supplied; but the proper remedy for an error or other defect in the recording, as in the case of the instrument of sasine itself, was the expeding and recording of a new instrument. (3) *The certificate of registration by the keeper of the register.* This certificate bore the date of presentment and the fact of registration, and specified the book and the pages of the book in which the instrument was engrossed.[1]

Certificate of registration.

II.—Charter and Infeftment after the Infeftment Act, 1845, till the Lands Transference Act, 1847.[2]

The only alteration made by the Infeftment Act, 1845,[3] on the form of the feu-charter formerly in use was that it provided a short form for the precept of sasine, desiring any notary public to give sasine, or liferent sasine, or sasine in liferent and fee respectively, as the case might be.[4] The Act made it unnecessary (from and after 1st October 1845) to give symbolical delivery or to proceed to the ground of the lands, and declared that it should be sufficient to produce to a notary public the warrant for sasine and relative writs, and to expede and to record in the General Register of Sasines or in the Particular Register of Sasines applicable to the lands an instrument of sasine in the form given by the Act,[5] at any time within the life[6] of the party in whose favour the instrument was expede. If the precept was in the new form, the instrument had to be in the form given by the Act.[7] The Act also made it competent, in case of any defect or error in an instrument of sasine, to expede and record a new instrument.[8] The form of instrument given by the Act consisted of four parts:—(1) The introductory clause, containing the notary's declaration that, at a certain place, the charter or other warrant of infeftment and relative writs were produced to him. (2) Narrative of the warrant and midcouples, the engrossment

Infeftment Act, 1845, introduced new form of precept of sasine.

Symbolical delivery rendered unnecessary.

Parts of instrument of sasine under the Act of 1845.

[1] For authorities for this paragraph, see H.R. 55 *et seq.*
[2] See H.R. 64 *et seq.*
[3] 8 & 9 Vict., c. 35.
[4] S. 5, schedule (A).
[5] S. 1, schedule (B).
[6] S. 2.
[7] S. 5.
[8] S. 4.

verbatim of the precept of sasine (in old or new form), and of the testing clause of the warrant. (3) Clause of delivery of sasine under any real burdens, etc. (4) Testing clause. The testing clause contained no date, as the date of presentment and of the entry set forth on the instrument by the keeper of the record was taken to be, under the Act, the date of the instrument and infeftment.[1] The notary public signed each page, but the witnesses, being, in terms of schedule (B), no longer witnesses to the giving of sasine, but simple witnesses to the notary's subscription, required to sign the last page only.

Methods of infeftment between 1845 and 1847.

The methods of infeftment subsequent to the Act of 1845, and prior to 1847, were accordingly these:—(1) *If the charter contained a precept in the old form*, either (*a*) after symbolical delivery expeding an instrument of sasine in the old form, and recording it within sixty days of its date; or (*b*) expeding an instrument of sasine in the new form, and recording it at any time within the life of the party in whose favour it was expede. (2) *But if the charter contained a precept in the new form*, the latter only of these two methods (*i.e.* method *b*) was available.

III.—Charter and Infeftment after the Lands Transference Act, 1847, till the Titles to Land Act, 1858.[2]

Lands Transference Act, 1847, introduced short forms of various clauses.

The Lands Transference Act, 1847,[3] made it lawful, but not imperative, to insert in dispositions and conveyances, and other deeds and instruments necessary for the transmission of lands and other heritages not held burgage, short statutory forms of the following clauses:[4]—(1) Clause declaring the term of entry; (2) clause of obligation to infeft; (3) procuratory of resignation; (4) clause of assignation of writs and evidents; (5) clause of assignation of rents; (6) clause of obligation to free and relieve of feu-duties and casualties due to the superior and of public burdens; (7) clause of warrandice; and (8) clause of registration for preservation, or for preservation and execution.

[1] S. 3; Bell's Lect. i. 670.
[2] See H.R. 68 *et seq.*
[3] 10 & 11 Vict., c. 48.
[4] See ss. 1, 2, 3, and schedule (A).

The Act repeated the form of precept of sasine introduced by the Act of 1845. The forms provided by the Act were declared to have the same import as the longer forms previously in use, and were as follows:—

"*After the inductive and dispositive clauses the deed may proceed thus* :—'With entry at the term of [*here specify the date of entry*]; and I oblige myself to infeft the said [*here insert the name of the disponee*] and his foresaids, to be holden *a me* [*or* de me, *or* a me vel de me, *as the case may be*] ;[1] and I resign the said lands and others for new infeftment ;[2] and I assign the writs, and have delivered the same according to inventory ; and I assign the rents ; and I bind myself to free and relieve the said [*here insert the name of the disponer*] and his foresaids of all feu-duties, casualties, and public burdens ; and I grant warrandice ; and I consent to registration hereof for preservation [*or* for preservation and execution]. Moreover, I desire any notary public to whom these presents may be presented to give to the said [*here insert the name of the disponee*] or his foresaids sasine [*or* liferent sasine, *or* sasine in liferent and fee respectively, *as the case may be*] of the lands and others above disponed.[3] In witness whereof [*here insert a testing clause in the usual form*].'"

The statute of 1847 had in view primarily the form of a disposition as opposed to a feu-charter or other original feu-right; but appended to schedule (A), which contains the new form of conveyance, there is a note to the effect that, whilst the clauses given in the schedule were assumed as occurring in a disposition, they might be used in other deeds and instruments, and that in the event of its being necessary to omit, vary, or qualify any one or more of them, this might be done and the other clauses might be retained. The clauses in the charter which came into use after the Act were these: (1) narrative clause; (2) dispositive clause; (3) term of entry; (4) clause of *tenendas*; (5) clause of *reddendo*; (6) clause of assignation of the writs and title-deeds; (7) clause of assignation to the rents; (8) obligation to free the subjects of public burdens; (9) clause of warrandice; (10) clause of registration; (11) precept of sasine; and (12) testing clause—the clauses 3, 6, 7, 8, 9, 10, and 11 being in the shortened forms given in the Act. The Act made no change as regards infeftment.

Act did not affect infeftment.

[1] Obligation to infeft *a me* or *a me vel de me* in any disposition rendered unnecessary by Titles to Land Act, 1858, s. 5, see pp. 24, 110, *infra*.

[2] Procuratory or clause of resignation in a disposition rendered unnecessary by Conveyancing Act, 1874, see p. 130, *infra*.

[3] This was the form of excerpt introduced by Act of 1845.

IV.—Charter and Infeftment after the Titles to Land Act, 1858, till the commencement of the Titles to Land Consolidation Act, 1868.[1]

Provisions of Titles to Land Act, 1858.

The Titles to Land Act, 1858,[2] whilst providing that nothing contained in it should prevent the constitution, transmission, or completion of land rights by the forms in use prior to the passing of the Act,[3] contained certain important provisions both as to the form of deeds of conveyance and as to the infeftment thereunder. With regard to the form of the charter, the Act of 1858 made it unnecessary to insert in a feu-right (or in a disposition) a precept of sasine,[4] and allowed, in place of a full description of the lands, a short description of them in statutory form, in the event of their having been particularly described in a prior recorded writ.[5] The Act also made it competent to take infeftment by recording a conveyance (including a feu-right) with a warrant of registration thereon;[6] or, if a conveyance of lands was contained in a deed either granted for further purposes and objects (such as a marriage contract, deed of trust, or deed of settlement), or conveying separate lands or separate interests in the same lands to the same or different persons, made it sufficient to record a notarial instrument.[7] Further, the Act authorised the insertion in any conveyance of a clause of direction immediately before the testing clause specifying the part of the conveyance which the granter desired to be recorded in the Register of Sasines. On a conveyance containing such a clause being presented for registration, the keeper of the register was to record only the part specified, together with the clause of direction, testing clause, and warrant of registration, and such recording was to have the same effect as if a notarial instrument containing the part specified had been expede and recorded.[8] Notwithstanding a clause of direction, it was competent by the Act to record the whole deed with warrant of registration; or if the deed con-

Precept of sasine rendered unnecessary.

Description by reference in statutory form.

Infeftment by recording conveyance or notarial instrument.

Clause of direction.

1 See H.R. 71 *et seq.*
2 21 & 22 Vict., c. 76.
3 S. 20.
4 Ss. 5, 36.
5 S. 15, schedule (L).
6 S. 1, schedule (A), No. 1.
7 S. 2, schedule (B).
8 S. 3, schedule (C).

taining such a clause of direction was granted for further purposes and objects than the conveyance of land, or conveyed separate lands or separate interests in the same lands, to expede and record a notarial instrument; but it was declared that, if a notarial instrument was used, no part or parts of the conveyance directed to be recorded should be omitted from it.[1] The Act also provided a method of infeftment for a disponee under a general conveyance, or any other party having acquired a right to such conveyance, viz. the expeding of a notarial instrument in a form provided by the Act.[2] If the notarial instrument was expede by a party other than the original disponee, it had to set forth the title or series of titles by which he acquired right to such conveyance, and the nature and extent of his right.[3] It was declared further that all conveyances, with warrants of registration, and all notarial instruments authorised by the Act to be recorded in the Register of Sasines, might be recorded at any time during the life of the party on whose behalf the same were presented for registration; that the date of entry in the minute-book should be held to be the date of registration, and that the date of registration should be equivalent to the date of registration of instruments of sasine according to the law and practice then existing;[4] that extracts of all conveyances, warrants of registration, and notarial instruments recorded in terms of the Act should make faith in all cases except where the recorded writ should be offered to be improven;[4] that in case of any error or defect in any notarial instrument expede or to be expede in virtue of the Act, or of the Act 8 & 9 Vict., c. 31,[5] or in the recording of any such instrument, or in the recording of any conveyance or warrant of registration, it should be competent of new to make and record a notarial instrument, or of new to record the conveyance with the original or a new warrant of registration;[6] and that the Act of 6 & 7 William IV., c. 33,[7] should extend and be applicable to notarial instruments authorised by the Act, and

Infeftment under general conveyance.

Conveyances or notarial instruments might be recorded at any time during life of party for whom presented for registration.

Extracts to make faith.

Power to record of new conveyances, etc.

Erasures in recorded instruments protected.

[1] S. 3.
[2] S. 12, schedule (H).
[3] S. 12. See *Smith*, 8 M. 204.
[4] S. 19.
[5] An Act regarding the transmission and extinction of heritable securities.
[6] S. 31, as altered by s. 35 of 23 & 24 Vict., c. 143.
[7] See p. 20, *supra*.

to notarial instruments expede and to be expede under the Act 8 & 9 Vict., c. 31 (s. 4).[1]

Methods of infeftment after 1858.

The methods of taking infeftment on a charter subsequent to the Act of 1858 were accordingly these:—

A. Where the charter contained a description of the lands warranting infeftment *de plano*:

Whether it contained a precept of sasine in the old or the new form or not, and whether it contained further purposes or dealt with separate lands or not, and whether it contained a clause of direction or not—

(I.) Recording the charter with a warrant of registration at any time within the life of the person on whose behalf it was presented for registration.

If the charter contained a clause of direction—

(II.) Recording the part directed to be recorded, together with the clause of direction, testing clause, and warrant of registration, within the like time.

If the charter contained further purposes or dealt with separate lands—

(III.) Recording a notarial instrument[2] in the form of schedule (B) of the Act of 1858 within the like time, it being necessary, if the charter contained a clause of direction, not to omit the portion directed to be recorded.

If the charter contained a precept of sasine in either the old form or the form of schedule (A) of the Infeftment Act of 1845—

(IV.) Expeding and recording within the like time an instrument of sasine in the form of schedule (B) of the Infeftment Act.

If the charter contained a precept of sasine in the old form—

(V.) After symbolical delivery, expeding an instrument of sasine in the old form and recording it within sixty days of its date.

[1] S. 33, as corrected by s. 37 of 23 & 24 Vict., c. 143.

[2] Whilst all conveyances, including feu-charters, had under the Act of 1858 to be recorded with warrants of registration, such warrants were not required in recording notarial instruments or instruments of sasine till 1868; see 31 & 32 Vict., c. 101, s. 141.

B. Where the charter described the lands in general terms: Whether the charter contained a precept of sasine or not—

(I.) Expeding a notarial instrument in the form of schedule (H) of the Titles to Land Act, 1858, and recording it within the lifetime of the person on whose behalf it was expede.

If the charter contained a precept of sasine either in the old form or in the form of schedule (A) of the Infeftment Act of 1845—

(II.) Expeding an instrument of sasine in the form of schedule (B) of the Infeftment Act, and recording it within the like time.

If the charter contained a precept of sasine in the old form—

(III.) After symbolical delivery, expeding an instrument of sasine in the old form and recording it within sixty days of its date.

Titles to Land Act, 1860.

The Titles to Land Act, 1858, did not apply to subjects held burgage, but its provisions were extended to these subjects by the Titles to Land Act, 1860.[1] The latter Act made various amendments on the Act of 1858, but the only points of which notice may be taken here are (1) the enactment that a deed should, in the absence of any reference in the warrant of registration to a clause of direction in the deed, be engrossed in the register as if it had contained no clause of direction, and (2) the introduction of a form of warrant of registration applicable to cases in which the clause of direction was to be acted on.[2]

1 23 & 24 Vict., c. 143.

2 23 & 24 Vict., c. 143, s. 25, and schedule (K).

CHAPTER III

CHARTER AND INFEFTMENT IN THEIR PRESENT FORM

THE feu-charter and infeftment in their present form are chiefly regulated by the Titles to Land Consolidation Act, 1868,[1] as amended by the Titles to Land Consolidation Amendment Act, 1869,[2] and by the Conveyancing Act, 1874.[3] Section 4 of the Act of 1868 repealed *in toto* the following Acts:—(1) Heritable Securities Act, 1845;[4] (2) Service of Heirs Act, 1847;[5] (3) Lands Transference Act, 1847;[6] (4) Lands Transference Burgage Act, 1847;[7] (5) Heritable Securities Act, 1847;[8] (6) Crown Charters Act, 1847;[9] (7) the Act of 1850,[10] dealing with the titles by which religious or educational societies hold land; (8) Heritable Securities Act, 1854;[11] (9) Titles to Land Act, 1858;[12] (10) Titles to Land Burgage Act, 1860.[13] The Act of 1868 also repealed[14]—(11) Section 6 (dealing with the issuing of precepts from Chancery) of the Infeftment Act, 1845,[15] and (12) every other Act or Acts and such parts of every other Act or Acts as were inconsistent with it. This repeal was declared not to affect any right or liability existing under the repealed Acts, or to invalidate anything theretofore done in pursuance of these Acts, or to revive any deed, form, procedure, or practice rendered by them unnecessary; and it was provided that rights constituted or acquired under these Acts might be completed, transferred, or extinguished either under them or under the repealing Act.[16]

Acts repealed by Act of 1868.

Saving of rights under repealed Acts.

[1] 31 & 32 Vict., c. 101.
[2] 32 & 33 Vict., c. 116.
[3] 37 & 38 Vict., c. 94.
[4] 8 & 9 Vict., c. 31.
[5] 10 & 11 Vict., c. 47.
[6] *Ibid.* c. 48.
[7] *Ibid.* c. 49.
[8] *Ibid.* c. 50.
[9] 10 & 11 Vict., c. 51.
[10] 13 & 14 Vict., c. 13.
[11] 17 & 18 Vict., c. 62.
[12] 21 & 22 Vict., c. 76.
[13] 23 & 24 Vict., c. 143.
[14] S. 4.
[15] 8 & 9 Vict., c. 35.
[16] S. 4.

The Act of 1868, in consolidating the law of conveyancing relating to heritable rights, re-enacted, with variations, many of the provisions of the different Acts which it had repealed. The provisions of this Act and the Conveyancing Act, 1874, will be referred to, in dealing with the clauses of the charter in its present form.

The form[1] of the feu-charter which is now in use is as follows :— Modern form of feu-charter.

I, A (*full name and designation of superior*), heritable proprietor of the subjects hereinafter disponed, IN CONSIDERATION of the sum of £ sterling, instantly paid to me by B (*full name and designation of vassal*), of which I hereby acknowledge the receipt, and of the feu-duty and other prestations after specified (*if any other consideration, onerous or gratuitous, exists, here state it*), Do hereby SELL and in feu-farm DISPONE to and in favour of the said B, and his heirs and assignees whomsoever, heritably and irredeemably, ALL and WHOLE (*here describe the subjects intended to be conveyed, adding*)—Together with my whole right, title and interest in the *dominium utile* of said subjects (*and if there are any reservations, real burdens, conditions, etc., under which the charter is to be granted, say*)—But always with and under the reservations, real burdens, conditions, provisions, restrictions, and qualifications (*or such of these as may be applicable*) following, viz. (*here insert them, and add*, All which reservations, burdens, conditions, etc. (*as the case may be*), are hereby declared real and preferable burdens upon and affecting the said subjects hereby disponed, and are appointed to be inserted in any notarial instrument to follow hereon, and to be inserted or validly referred to in all future deeds of transmission, decrees, instruments, or other writs of or relating to the said subjects, or any part thereof, otherwise such deeds, decrees, instruments, and writs shall be void and null : WITH ENTRY at : TO BE HOLDEN the said subjects of and under me and my heirs and successors, as immediate lawful superiors thereof, in feu-farm, fee, and heritage for ever : FOR PAYMENT to me and my foresaids by the said B and his foresaids of the sum of £ sterling yearly, in name of feu-duty, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at for the half-year preceding, and the next term's payment thereof at following, and so forth at the said two terms in the year in all time thereafter, with a fifth part more of each term's payment of liquidate penalty in case of failure in the punctual payment thereof, and interest at the rate of five per centum per annum of the said feu-duty from the respective terms of payment during the non-payment of the same (*if any permanent increase of the feu-duty, or any fixed sums payable at fixed intervals have been stipulated for, here insert them*) : AND I assign the writs, but to the effect only of maintaining and defending the right of the said B and his foresaids in the subjects hereby disponed ; and for that purpose I oblige myself and my foresaids to make the same, to the extent of a legal progress, forthcoming to the said B and his foresaids, at their expense, on all necessary occasions, and that on a receipt and obligation to re-deliver the same within a reasonable time, and under a suitable penalty : AND I assign the rents : AND I

I. Narrative clause.

II. Dispositive clause.

III. Term of entry.
IV. *Tenendas.*
V. *Reddendo.*

VI. Assignation of writs.

VII. Assignation of rents.

[1] Jur. Styles (5th edition), vol. i. 11 ; Hendry's Styles, 15.

VIII. Obligation to relieve of public burdens. IX. Clause of warrandice.

bind myself and my foresaids to free and relieve the said B and his foresaids of all feu-duties and casualties, or sums of money in lieu thereof, payable to my superiors now and in all time coming, and of all public and parochial burdens exigible prior to said term of entry: AND I grant warrandice: AND I consent to registration hereof for preservation.—IN WITNESS WHEREOF, these presents, written upon this and the preceding pages of stamped vellum (*or paper*) by C (*full name and designation*), clerk to D (*full name and designation*), are subscribed by me at upon the day of in the year One thousand nine hundred and , before these witnesses, E (*full name and designation*), and F (*also full name and designation*).

X. Clause of registration.

XI. Testing clause.

(Signed) A.

(Signed) E, *witness.*
F, *witness.*

1. Narrative Clause.

I. NARRATIVE CLAUSE.—This clause, sometimes called the inductive clause, sets forth (1) the names and designations of the parties to the deed, and (2) the cause of granting.

Accretion.

The expression "heritable proprietor" in a conveyance implies that the disponer is infeft in the lands disponed, and the practice is to have the title of the granter of a feu-right or a disposition completed prior to his making a grant. But infeftment in virtue of a feu-right or a disposition granted by a person having only a personal title, or even no title, will be validated *accretione* by his subsequent infeftment, even although it takes place subsequent to his disponee's death, according to the *brocard, jus superveniens auctori accrescit successori*; for accretion operates whether a disponer simply completes his title or first acquires and then completes his title subsequent to the date of the grant made by him. Besides, when a person, not infeft, grants conveyances to different persons, and is thereafter infeft, his infeftment accresces (in the absence of an effectual mid-impediment) to his disponees according to the priority in date of their infeftments and not equally to all, even though the last disponee has had his author infeft with a view to validating his own infeftment. The infeftment of an heir, however, does not accresce to a right granted by his ancestor, nor does the infeftment of assumed trustees accresce to rights granted by the trustees by whom they were assumed, nor does the infeftment of a truster accresce to rights granted by his trustees. Nor does accretion operate so as to carry to a disponee rights

acquired by the disponer subsequent to the date of the disposition, where such disposition is only of a particular right, or confined to the rights then vested in the disponer, or where the warrandice is from fact and deed only, or where the disposition has been granted for gratuitous consideration and without absolute warrandice, or where the conveyance is judicial, not voluntary.[1]

II. DISPOSITIVE CLAUSE.[2]—The dispositive clause is the ruling clause in a conveyance of lands. If the import expressed by other clauses differs from that expressed by this clause, it is the dispositive clause which receives effect.[3] If, however, the dispositive clause may have more than one meaning attached to it, other clauses may be referred to for ascertaining the true meaning of the dispositive clause,[4] or they may be referred to in order to supply an obvious omission in the dispositive clause.[5] This clause contains (*a*) the appropriate words of conveyance; (*b*) the name of the disponee and the agreed-on destination; (*c*) a description of the lands disponed; and (*d*) the reservations, burdens, conditions, restrictions, and qualifications of the grant. 2. Dispositive Clause.

It is usual for the disponer, in a charter, *to sell, and in feu (or blench) farm dispone*, if the charter is for an onerous consideration; and *to give, grant, and in feu (or blench) farm dispone*, if the charter is not for an onerous consideration.[6] Words of conveyance.

Prior to the Titles to Land Consolidation Act, 1868,[7] the word "dispone" was essential in conveyances of heritages *mortis causa*, and a testamentary deed which did not use the term "dispone," in expressing an act of alienation of heritage, afforded not even a good ground of action against the heir of the testator to have him ordained to denude.[8] But the Act of 1868[9] made testamentary deeds, whether they had been executed History of word "dispone."

1 For authorities (*a*) on accretion, see H.R. 82; (*b*) on consent by owner, see H.R. 83; and (*c*) of authority to grant conveyances by pupils and their tutors, etc., see H.R. 85 *et seq.*

2 On dispositive clause, see Duff, 60; Menzies, 502; Bell's Lect. i. 582; Bell's Prin. 760; Ersk. 2, 3, 23; Juridical Styles (5th ed.), vol. i. 15.

3 *Chancellor*, 10 M. 995.

4 *Orr*, 19 R. 700; rev. 20 R. (H.L.) 27.

5 See, *e.g.*, *Sutherland*, M. App. *voce* Tailzie, No. 8, 1 Ross' L.C. 45; Lord Chancellor Eldon in *Kerr*, 5 Pat. 320 at p. 444.

6 Juridical Styles (5th ed.), vol. i. 11, 15.

7 31 & 32 Vict., c. 101.

8 *Kirkpatrick*, 11 M. 551, aff. 1 R. (H.L.) 37; and other cases cited in H.R. 93.

9 S. 20.

by any person alive at the commencement of the Act or whether they were executed thereafter, which contained neither the word "dispone" nor any word or words importing a conveyance *de præsenti*, valid for settling the succession to lands. It was also made unnecessary by the Act, as construed by decisions, to use words naming the lands or even descriptive of heritage as distinguished from moveables, it being left to the context, in cases where the words used were primarily applicable to moveables, to show whether heritage was intended to be included. The result of the provision was to make a deed executed in any of the forms of testamentary deeds relating to personal estate (including the forms allowed by 24 & 25 Vict., c. 114) effectual as a settlement of lands, if the intention to convey lands was clear.[1]

Inter vivos deeds require *de præsenti* words of conveyance, or words importing present intention to convey.

The general opinion has always been that the word "dispone" was indispensable in an *inter vivos* conveyance of land, coming into operation before the passing (7th August 1874) of the Conveyancing Act, 1874.[2] Section 27 of that Act, however, provides that "it shall not be competent to object to the validity of any deed or writing as a conveyance of heritage coming into operation after the passing of this Act on the ground that it does not contain the word 'dispone,' provided it contains any other word or words importing conveyance or transference, or present intention to convey or transfer."

Name of grantee and agreed-on destination.

After the words of alienation come the name of the grantee and the agreed-on destination. The conveyance in a charter or a disposition is generally in favour of the grantee, and his heirs and assignees whomsoever.[3] But an *inter vivos* conveyance to the disponee alone is equivalent to a conveyance in favour of the disponee and his heirs, or his heirs and assignees.[4]

"Heritably and irredeemably."

It is the practice to close the words of conveyance in a feu-charter or disposition[5] with the words "heritably and irredeemably"; but the words are unnecessary.[6]

1 See cases in H.R. 93.

2 See Menzies, 503; Bell's Lect. i. 583 *et seq.*; *Reid*, 16, S. 363.

3 Jur. Styles (5th ed.), vol. i. 11, 90.

4 Duff, 61; Stair, 3, 5, 5–6; Ersk. 2, 3, 4; 3, 10, 1; and see H.R. 95.

5 Jur. Styles (5th ed.), i. 11, 90.

6 For persons to whom conveyance taken when buyer is minor, pupil, firm, incorporated company, etc., see H.R. 97 *et seq.*

Description of lands.

After the destination in a feu-right or a disposition is the description of the subjects conveyed. The only rule as to the manner in which lands ought to be described is that they should be clearly identified.[1]

Classes of description.

For the purposes of conveyances, descriptions may be divided into at least six classes:—(1) general descriptions; (2) particular descriptions; (3) descriptions by statutory reference; (4) descriptions by general name, in terms of section 13 of the Titles to Land Consolidation Act, 1868; (5) descriptions in general terms; and (6) descriptions by reference, not in statutory form.

(1) General descriptions.

A general description consists simply of the name of the lands, without any specification of measurement or boundaries,[2] and is appropriate to the conveyances of old estates which have not been subdivided,[3] or of lands which have been erected into a barony.[4] In a particular description, the lands are described by boundaries, or by measurement and boundaries, with or without reference to a plan, and generally by the statement of the parish and the county in which they lie. A particular description is the appropriate form for a new description.[5] Descriptions by reference in statutory form were first introduced by the Titles to Land Act, 1858.[6] The reference allowed by this and subsequent Acts has always been to a particular description of the lands contained in any prior conveyance or other writ duly recorded in the appropriate Register of Sasines. Section 15 of the Act of 1858 (which applied only to subjects held by feu or blench tenure) made it sufficient as a description to specify (1) the leading name or names, or other short distinctive description, of the lands conveyed, and (2) the name of the county and (3) the parish or supposed parish in which the lands lay, and to refer to (4) the particular description contained in the prior recorded conveyance or other writ in or as nearly as might be in a form provided by the Act.[7] Section 34 of the Titles to Land Burgage

(2) Particular descriptions.

(3) Descriptions by reference in statutory form.

Enactments of Act of 1858 regarding descriptions by reference.

1 See H.R. 98.
2 Menzies, 507.
3 *Ibid.*
4 *Ibid.*; Bell's Lect. i. 589.
5 See H.R. 99 *et seq.*, and cases there cited; and see *Caledonian Railway Co.*, 2 F. 100.
6 21 & 22 Vict., c. 76.
7 Schedule (L), No. 1.

Enactments of Act of 1860 regarding such descriptions.

Act, 1860,[1] repealing section 15 of the Act of 1858, made it necessary only (1) to specify the name of the county, and, where the lands were held burgage, the name of the burgh and county, in which they were situated, and (2) to refer to the particular description contained in the prior recorded conveyance, etc.[2] These provisions being repealed along with the other provisions of the Titles Acts of 1858 and 1860 by the Titles to Land Consolidation Act, 1868,[3] section 11 of the Act of 1868 substituted in their place a declaration that in describing lands it should be sufficient to specify (1) some leading name or names or some distinctive description of the lands, as contained in the titles thereto, and (2) the name of the county, and, where the lands were held by burgage tenure, the name of the burgh and county, in which they were situated, and (3) to refer to the particular description of such lands as contained in the prior recorded conveyance or deed, in a form provided by the Act.[4] Section 11 of the Consolidation Act, 1868, has been repealed by section 61 of the Conveyancing Act, 1874. Under section 61 of the Act of 1874[5] the essentials in a description by reference now (*e.g.* since 1874) are—(1) specification of the name of the county, and, where the lands were prior to the commencement of the Act held by burgage or by booking, specification of the name of the burgh and county in which the lands are situated; and (2) reference to the particular description of the lands, as contained in any conveyance, deed, or instrument of or relating thereto, the writ containing the particular description being identified by naming the granter of it, and by specifying its date, the Register of Sasines in which it is recorded, and the date of recording it, or such of these particulars as are applicable to the writ referred to.[6] Section 13 of the Titles to Land Consolidation Act, 1868, re-enacting, with verbal variations, section 16 of the Titles to Land Act, 1858, provides that, where several lands are comprehended in one conveyance in favour of the same person or persons, a clause may be inserted in the conveyance

Enactments of Act of 1868 regarding such descriptions.

Essentials of a description by reference in statutory form since 1874.

(4) Descriptions by general name in terms of section 13 of Act of 1868.

[1] 23 & 34 Vict., c. 143.
[2] Schedule (H), No. 1.
[3] 31 & 32 Vict., c. 101.
[4] Schedule (E).
[5] 37 & 38 Vict., c. 94.
[6] Schedule (O); *Murray's Tr.*, 14 R. 856; *Matheson*, 5 F. 448; and *Cattanach's Tr.*, 11 R. 972; and H.R. 103 *et seq.*

specifying a general name for the lands particularly described therein, and declares that on the conveyance, or an instrument following thereon, containing such particular description and clause, being duly recorded in the appropriate Register of Sasines, it shall be competent in all subsequent conveyances, etc., relating to such lands to use the general name as the name of the lands. In order, however, to make the conveyance as effectual as if it contained a particular description of the lands, it is essential to refer in the form of schedule (G) of the Act to a recorded conveyance or instrument containing such clause and particular description. By a description in general terms is meant such a description as either of the following:— "All and Whole the lands, wherever situated," belonging to the disponer; or "All and Whole the lands situated" in a certain parish or county belonging to the disponer. Such a description is seldom, if ever, found in either a feu-right or an ordinary *inter vivos* disposition; and disponees under deeds containing such descriptions can use such deeds only as midcouples in making up a feudal title to the lands.[1] Lands may also be described in a conveyance as the lands contained in a certain deed which may, although sufficiently identified, not be identified in accordance with the enactments regarding descriptions by reference.[2] Thus, a proprietor may dispone lands and only describe them as those contained in a deed, the name of the granter and the date of which are stated. A conveyance with such a description will not warrant infeftment *de plano* under it, but it can, like a conveyance with a description in general terms, be used as a midcouple in the completion of the disponee's title. In one sense, the description in question is a description in general terms, but it will be convenient to confine in the sequel the expression "description in general terms" to those cases in which there is no reference to any deed containing a description of the lands.[3]

(5) Descriptions in general terms.

(6) Descriptions by reference not in statutory form.

The description in a feu-right or a disposition may con- Descriptions bounding or non-bounding.

[1] *Belches*, Jan. 21, 1815, F.C.; *Graham's Crs.*, M. 49.

[2] See Bell's Lect. i. 589.

[3] On descriptions, see further H.R. 98 *et seq.*

How bounding title constituted.

stitute a *bounding charter* or a *bounding title*.[1] A bounding charter or a bounding title may be constituted[2]—(1) by specific boundaries,—*e.g.*, by the boundaries of the subjects disponed being stated to be certain walls,[3] towing paths,[4] etc.; (2) by boundaries and non-taxative measurements combined, the boundaries in this case overriding the measurements, in accordance with the general rule that boundaries, if clear, though accompanied by other particulars, must rule, the other particulars being held as demonstrative or illustrative;[5] (3) by taxative, as opposed to demonstrative, measurements,—as, *e.g.*, when words plainly taxative, such as "only" or some corresponding expression, are applied to the measurements,[6] or when the extent is made an inherent quality of the bargain, as when the price or feu-duty depends on the extent, in which cases the measurements will predominate over the physical description or general name;[7] (4) by measurements which, taken along with the specification of certain boundaries, bring out precisely the whole of the boundaries, so as to make the enclosed space a matter of certainty;[8] (5) by a reference enumerative of the lands as possessed by certain tenants appended to a general name of subjects not described by boundaries, such reference being held to be taxative,[9] unless subsequent possession is decisive to the contrary,[10] or unless the reference to possession is shown, on a construction of the deed, to be merely demonstrative;[11] (6) by stating that the lands lie within a certain area, as in a particular parish[12] or county;[13] or (7) by a reference to a plan for the boundaries;[14] but where there is a reference to a plan accompanied by other descriptions for the boundaries, it depends on the circumstances of each case

[1] *Wilson*, 4 Br. Sup. 236; and see Logie, 5 F. 859; *Louttit's Trs.*, 19 R. 791; *Magistrates of Ayr*, 25 R. 1184.

[2] Stair, 2, 3, 26; Ersk. 2, 6, 2; Duff, 63; Bell's Lect. i. 596; Rankine on Land Ownership, 96.

[3] *Smyth*, 5 Pat. 669; *Kerr*, 3 D. 154; aff. 1 Bell's App. 499.

[4] *Fleming*, 3 D. 1015.

[5] *Currie*, 16 R. 237; and other cases in H.R. 108.

[6] Duff, 63; Rankine on Land Ownership, 97; Bell's Lect. i. 599; Brown, 8 F. 534.

[7] *Hepburn*, M. 14,168; *Darroch*, 4 D. 219; and see H.R. 108; *Brown*, 8 F. 534.

[8] Lord Ardmillan in *Stewart*, 4 M. 283.

[9] *Murray*, M. 2262.

[10] *Gardner*, 2 D. 185; rev. 2 B. App. 129.

[11] *Critchley*, 11 R. 475.

[12] *Hepburn*, 2 S. 525; *Gordon*, 13 D. 1.

[13] Bell's Lect. i. 597; and see Lord Watson in *Lord Advocate*, 2 F. (H.L.) 1 at p. 10.

[14] *North British Railway Co.*, 1 M. 200.

whether the plan will overrule the other descriptions,[1] or be overruled by them.[2]

Servitudes, etc., may be acquired beyond bounding title.

Although a person possessing under a bounding title cannot, by prescription, acquire the ownership of a corporeal subject lying beyond the limits of his title,[3] yet he may, in virtue of his title and prescriptive possession thereon, acquire a right of servitude[4] or other incorporeal right (such as salmon fishings[5]) beyond his express boundaries. On the other hand, a proprietor, if he is not excluded by his own boundaries, can by prescription acquire, as part and pertinent of his own lands, lands which lie within another proprietor's boundaries, because he cannot be limited by the boundaries of another.[6]

Where limits vague.

Where the limits in a bounding charter are precise, no proof of contrary possession will be allowed to set them aside;[7] but where such limits are vague or ambiguous, it is competent to fix them by the aid of extrinsic evidence.[8]

Points connected with boundaries.

What is described as the boundary of a subject is as a general rule excluded therefrom. Thus, if subjects are bounded in the titles "by" walls, the walls do not fall to the disponee;[9] but if the subjects are described as "surrounded by,"[10] or "enclosed by,"[11] walls, the walls will form part of the subjects, and, when it is desired to make walls common property, the centre of them should be declared the line of the boundary.[12]

"By" walls, etc.

"By" highway, etc.

A boundary "by" a highway is exclusive of the highway,[13] and a boundary "by" a street is exclusive of the street;[14] but it has been held that when a proprietor dispones two pieces of ground, one on each side of a public road and opposite each other, and describes each property as bounded by the road,

1 *Glassell*, 5 Pat. 104; *North British Railway*, 6 R. 640.

2 *Paterson*, 13 D. 997; *Currie*, 16 R. 237; and see H.R. 109.

3 Stair, 2, 3, 26; Ersk. 2, 6, 3; Bell's Prin. 738; and H.R. 109.

4 *Beaumont*, 5 D. 1337.

5 *Earl of Zetland*, 11 M. 469; and see *Earl of Dalhousie*, 3 M. 1168.

6 Ersk. 2, 6, 3; *Earl of Fife's Trs.*, 8 S. 326.

7 *Darroch*, 4 D. 219; *Gibson*, 7 M. 394.

8 *Davidson*, 7 D. 342; *Dalhousie's Tutors*, 17 R. 1060; and see *Hetherington*, 7 F. 706; and *Brown*, 8 F. 534.

9 *Smyth*, 5 Pat. 669.

10 Bell's Lect. i. 600.

11 See *Wilson*, 7 D. 113.

12 Bell's Lect. i. 600.

13 *Ewing*, 20 D. 351; and see Rankine on Land Ownership, 103.

14 *Duke of Buccleuch*, 3 M. 1114; and see *Magistrates of Culross*, Hume, 554; *Magistrates of St Monance*, 7 D. 582; *Logie*, 5 F. 859; *Louttit's Trs.*, 19 R. 791.

the presumption is that the boundary of each of the two pieces is the *medium filum* of the road.[1]

"By" sea, etc.

In questions between subject-superiors and vassals, a boundary by the sea, or the seashore, or a navigable and tidal river, gives a right of property in the foreshore, subject to the rights of navigation and to the other rights which the public have in it, and also a right to ground recovered from the sea or river, whether by industry or alluvion. A title to land described as bounded by the sea-flood, the full sea, the flood-mark or the high-water mark, appears to exclude the foreshore, and to prevent the disponee from acquiring the foreshore by prescriptive possession; but it has been held that if a proprietor feus out a subject adjacent to the sea or to a navigable and tidal river, and gives the feuar the sea-flood or the flood-mark as his boundary, when he himself has no express title to the foreshore, he gives the feuar everything between the landward boundary of the feu and the sea or the river, and is not entitled to interpose himself between the feuar and the sea or river.[2]

"By" river.

When land is described as bounded, or is *de facto* bounded, by a river which is non-tidal yet navigable, or non-tidal and non-navigable, or by a mere stream, the disponee is *prima facie* entitled to the half of the *alveus* of the stream *ex adverso* of his lands, and the *medium filum* is taken to be his boundary.[3]

What the disponee under a charter or disposition acquires.

A grant of land is as extensive as a grant with parts and pertinents.

The disponee under a feu-right or disposition gets not only the *solum*, but also all "that forms a proper part of the land, from the sky to the centre."[4] It is customary to insert, after the description of the lands, the words "with the parts and pertinents of the said subjects," but these words are unnecessary, as they carry nothing more than would be carried if they were omitted.[5] Thus, when lands are disponed, the disponee gets the buildings,[6] and the fixtures connected with the lands or the buildings, as they are deemed *partes soli*, from being annexed,

[1] *Magistrates of Ayr*, 25 R. 1184.

[2] See H.R. 111; and add *Magistrates of Musselburgh*, 7 F. 308 (boundary by "sea beach"); *Cadell*, 7 F. 606 (boundary by "foreshore.")

[3] See H.R. 112, and cases there cited; and add *Menzies*, 4 F. 55. On lochs, see H.R. 113.

[4] Bell's Prin. 737; Rankine on Land Ownership, 93 and 163.

[5] *Gordon*, 13 D. 1.

[6] *Rose*, M. 9645; *Duke of Buccleuch*, 3 M. 528.

actually or constructively, to the soil.[1] The disponee gets also discontiguous lands,[2] mosses,[3] woods,[4] trees,[5] and orchards;[6] mines and minerals;[7] servitudes effeiring to the lands;[8] the right of trout fishing and of angling in rivers passing through the lands,[9] even in salmon casts,[10] the right, however, requiring to be exercised so as not to prejudice salmon fishing;[11] sea-ware and wreck;[12] such seats[13] in the parish church and such part of the churchyard[14] as have been allocated in respect of the lands, and thereby have become an adjunct of them.

Regalia do not pass as part and pertinent.

The *regalia* do not pass as part and pertinent of lands under a Crown grant. The *regalia majora*, which include the Sovereign's right of superiority, cannot be communicated to a subject. The *regalia minora* include, *inter alia*, the narrow seas, navigable rivers, highways, salmon fishings, mussels and oysters, ports and harbours, ferries, gold mines, and certain silver mines, treasure trove, and wrecks, and can, (with the exception of navigable rivers and highways) be acquired by express grant from the Crown or by prescription on a habile title.[15]

Foreshores.

Extent of foreshore.

The foreshore is the land that lies between high and low water-mark, the water-mark being the line of ordinary spring-tides.[16] When an estate, whether a barony or not, is *de facto* situated on the seashore, and the disposition thereof from the Crown does not, by express grant or specific boundary, extend the right of the disponee beyond high-water mark, there is no presumption that the foreshore is a pertinent of the land.[17] But a right of property in the foreshore, subject to the public uses of navigation and fishing, can be acquired—(1) by express grant

How title to foreshore acquired.

1 *Graham*, 2 R. 438; *Nisbet*, 7 R. 575; *Niven*, 2 S. 270; *Nisbet*, M. 9628; on fixtures, see Rankine on Land Ownership, 108; Bell's Prin. 1473; 1 Bell's Com. 786.

2 *Forsyth*, M. 9629; *Young*, M. 9636; *Duff*, 5 Pat. 762; *Dalrymple*, 3 D. 837.

3 *Dalegles*, M. 9641.

4 Stair, 2, 3, 73.

5 *Paul*, 2 D. 1286.

6 *Bruce*, M. 9638.

7 *Burly*, M. 9630; *Bruce*, M. 9642; *Oughterlony*, M. 164; *Addie*, 10 D. 836; Ersk. 2, 6, 1; Bell's Prin. 669, 740; and see further on mines and minerals, *Lord Advocate*, 2 F. (H.L.) 1, and p. 42, *infra*.

8 Bell's Prin. 745; *Borthwick*, M. 9632.

9 *Carmichael*, M. 9645; *Mackenzie*, 8 S. 816; aff. 6 W. & S. 31; *Earl of Galloway* 4 F. 851.

10 *Somerville*, 22 D. 279.

11 Cases in two preceding notes.

12 *Lord Saltoun*, 20 D. 89; *Baird*, 21 D. 848; rev. 23 D. (H.L.) 5, 4 Macq. 127; *Lord Advocate*, 6 M. 489.

13 *Duke of Roxburghe*, 3 R. 728; rev. 4 R. (H.L.) 76; Ersk. 2, 6, 11.

14 Ersk. 2, 6, 11.

15 Bell's Lect. i. 606; Bell's Prin. 748; and see H.R. 116.

16 *Musselburgh Real Estate Co.*, 5 F. 387; aff. 7 F. (H.L.) 113; *Aitken's Trs.*, 6 F. 465.

17 *Agnew*, 11 M. 309, in which prior cases as to foreshore are reviewed.

thereof from the Crown;[1] (2) by such prescriptive possession as can only be ascribed to a right of property under a Crown charter which does not, by express grant or specific boundaries, extend the right of the vassal beyond the high-water mark;[2] (3) by a grant of land from the Crown described in the conveyance as bounded by the sea;[3] (4) by prescriptive possession of the foreshore in virtue of a title granted by a subject (as opposed to the Crown) to lands described as bounded by the sea;[4] or (5) by prescriptive possession of the foreshore in virtue of a title granted by a subject to lands bounded *de facto*, although not expressly, by the sea.[5] In the last two cases it does not matter whether the title proceeded *a non habente potestatem*. Whether the foreshore is vested in the Crown or in a subject, it is available to the public for all purposes of navigation,[6] for conducting, in a proper mode, white-fishing,[7] and for taking, either on the foreshore or beyond it, limpets, cockles, and other small shellfish.[8] The Crown has within the three-mile limit an exclusive right to oysters and mussels, but its right to them may pass to an individual as a *separatum tenementum* apart from or along with lands, by express grant, or by prescriptive possession on a barony title *cum piscationibus*, or probably by prescription on a non-barony title *cum piscationibus*, but in no case without the mention of "fishings" in the dispositive clause.[9]

Public rights in foreshore.

How title to salmon fishings acquired.

For centuries the right of salmon fishing has been regarded as one of the *regalia minora*. A title to salmon fishings can be acquired (1) by express grant thereof from the Crown, either alone or by a clause *cum piscationibus salmonum* in the dispositive clause of a Crown charter of lands;[10] (2) by prescriptive possession of salmon fishing on a barony title

[1] See *Agnew, supra*; *Lord Advocate*, 6 R. (H.L.) 72.

[2] See *Agnew, supra*; *Lord Advocate, supra*; *Buchanan and Geils*, 9 R. 1218.

[3] See Lord Justice-Clerk in *Agnew, supra*; Lord Mure in *Lord Advocate, supra*; and Lord Watson in *Young, infra*; and see *Lockhart*, 5 F. 136.

[4] *Young*, 13 R. 314; aff. 14 R. (H.L.) 53; and see *Cadell*, 7 F. 606.

[5] See dicta in *Agnew, supra*; and in *Young, supra*; and see *Aitken's Trs.*, 6 F. 465.

[6] Ersk. 2, 1, 6; Stair, 2, 1, 5; Bell's Prin. 643; Rankine on Land Ownership, 235, and authorities there cited.

[7] *M'Douall*, 11 M. 688; 2 R. (H.L.) 49.

[8] See Rankine on Land Ownership, 238; as to other rights, see *Hope*, 6 F. 1004.

[9] *Ibid.*; *Parker*, 4 F. 698; aff. 6 F. (H.L.) 37.

[10] See *Mackenzie*, 3 D. 646; *Richardson, etc.*, 3 R. 1031; aff. 4 R. (H.L.) 76; *Duke of Argyll*, 18 R. 1094.

with or without a general clause of fishings;[1] (3) by prescriptive possession of salmon fishing on a Crown charter of lands not a barony, with a general clause of fishings[2]—*i.e.*, *cum piscationibus* or *cum privilegio piscendi, cum piscariis*, or probably *cum piscibus*;[3] (4) by prescriptive possession of salmon fishing on an express grant thereof in a conveyance granted by a subject-superior;[4] and (5) by prescriptive possession of salmon fishing on a title to land with a general clause of fishings.[4] By the Conveyancing Act, 1874, the period of possession necessary for acquiring a title by prescription to salmon fishings has been reduced from forty to twenty years.[5] For establishing a right to salmon fishing by prescription, the possession must be clear, and by a lawful mode.[6] The rule is that possession must be by net and coble; but where fishing by net and coble is impracticable, or probably where rod-fishing is more profitable, a title by prescriptive possession may be established by rod-fishing.[7]

Teinds.

"The teinds of lands," says Professor Montgomerie Bell, "that is, the portion of the produce formerly set apart to the church, and now belonging to those in right of the church, subject to the burden of ministers' stipends, do not pass with the lands as part and pertinent. They are a separate estate, and require special title."[8] This statement is too wide. Professor Menzies is more accurate in the following statement of the law: "Although teinds be disponed, they are not separated from the land until infeftment follows; and in such circumstances, therefore, a disposition of the lands will convey the teinds, although not expressly disponed, and the disponee will be entitled by the assignation of writs to take infeftment upon the open precept in the disposition of teinds.[9] When once

[1] *Nicol and Others*, 6 M. 972; *Lord Advocate*, 7 R. (H.L.) 122; *Lord Advocate*, 9 M. 744.

[2] *Stuart*, 5 M. 753; alt. 6 M. (H.L.) 123.

[3] For authorities showing that these expressions may be treated as equivalent, see Rankine on Land Ownership, 274.

[4] See *Stuart, supra*; *Lord Advocate*, 2 R. 27.

[5] *Ogston*, 21 R. 282; rev. 23 R. (H.L.) 16.

[6] *Hay*, 24 D. 230; rev. 4 Macq. 535; and *Duke of Athole*, 1 F. 651; *Maxwell*, 6 F. 245.

[7] For authorities see Rankine on Land Ownership, 276; and see *Warrand's Trs.*, 15 R. 833; rev. 17 R. (H.L.) 13; *Sinclair*, 17 R. 507; *Ogston, supra*; *Duke of Roxburghe*, 6 R. 663; *Stuart, supra*. For ports and harbours, ferries, gold and silver mines, see H.R. 124 *et seq.*

[8] Bell's Lect. i. 608.

[9] *Mansfield*, 1835, 13 S. 832.

separated, however, by being feudalised, a distinct title is requisite, and, therefore, where teinds had been acquired by disposition subsequent to an entail of the lands, they were found not to be carried by the entail title.[1] In very special circumstances, however, intention to convey the teinds will be presumed; and it is a main element in creating the presumption if the disponee is burdened with payment of the minister's stipend. The authorities for giving weight to such presumption are cited in the report of the case of *Mansfield*, last referred to."[2]

Dispositive clause, place for reservations, etc.

The appropriate place for reservations or conditions in favour of the parties under a feu-charter or a disposition is the end of the dispositive clause. Among such reservations or conditions are to be found, in practice, a reservation of mines and minerals, a right of pre-emption or of redemption, a reservation of power to divide the superiority, a clause of irritancy *ob non solutum canonem*, provision for allocation of feu-duty, stipulations as to the erection of buildings, etc.

Mines and minerals.

An important reservation, often made by a disponer, is a reservation of mines and minerals;[3] and the owner of mines and minerals, whether he be a superior or a vassal, can dispone them to any person. Thus mines and minerals may be held along with either (*a*) the superiority or (*b*) the property of lands, or may be held (*c*) as a separate property by one who is neither superior nor proprietor of the lands of which they form a part. When a superior or a vassal in right of minerals agrees to dispone his rights in his lands, other than his right to minerals, he ought to make his intention to reserve the minerals clear. The rule, however, is that, whilst a disposition of lands will include not only the surface but all the strata below it, the context may show that the disposition was not intended to include the minerals.[4] If a disponer conveys lands, reserving to himself the right or liberty to work the minerals, he has, in the absence of indication to the contrary, a right of property in them.[5] The value of minerals to a superior often depends very much on the

[1] *Spalding*, M. 14,461.

[2] Menzies (3rd ed.), 810; see also Duff, 67; Bell's Prin. 737; *Watt's Trs.*, 1869, 8 M. 132.

[3] On flexibility of expression "mines and minerals," see *Magistrates of Glasgow*, 14 R. 346; rev. 15 R. (H.L.) 94, and H.R. 127; and *North British Railway Co.*, 6 F. 900.

[4] *Orr*, 19 R. 700; rev. 20 R. (H.L.) 27.

[5] *Duke of Hamilton*, 11 R. 963; aff. 12 R. (H.L.) 65; see H.R. 128; and *Pringle*, 7 F. 820

conditions on which he is entitled to work them. A superior, in reserving the minerals from his disponee in feu, may stipulate either (*a*) that he shall not be liable for any damage to his vassal through the working of the minerals, in which case the vassal is not entitled to interdict such working because it will destroy the surface of the feu and the buildings thereon ; [1] or (*b*) that he shall be entitled to work the minerals subject to payment of the damages caused to the surface, in which case the vassal will be entitled to reparation for damage to the surface of the feu and the buildings thereon, whether these buildings were erected on or after the date of the feu-right.[2] But if a superior reserves the minerals, with [3] or without [4] a right to work them, then he can be interdicted by the vassal from working them if his working will probably injure the surface ; and even a right to work minerals, on payment of damages, does not include a power to withdraw support from the surface of the lands, unless such power is expressly or by plain implication given by the title,[5] read, if need be, in the light of the circumstances existing at its date.[6]

Clauses against subinfeudation only valid if made before 1874.

The Act 20 Geo. II., c. 50, abolished all clauses *de non alienando sine consensu superiorum*. This Act did not strike at the legality of conditions against subinfeudation, which are valid if they were made before the commencement of the Conveyancing Act, 1874, but invalid if they were made after that date. Neither of these two Acts has rendered illegal a clause of pre-emption in favour of the disponer of lands.[7] To be effectual against singular successors, a clause of pre-emption must appear on record.[8] Further, it is competent for a superior to stipulate for a right of redemption of the feu.[9]

Clause of pre-emption.

Clause of redemption.

Irritancy *ob non solutum canonem*.

The irritancy *ob non solutum canonem*, or tinsel of the feu, is often classed among the casualties of superiority, but it is rather a remedy against non-payment of the feu-duties,[10] or "a

1 *Buchanan*, 9 M. 554; rev. 11 M. (H.L.) 13.

2 *Neill's Trs.*, 7 R. 741 ; *Hallpenny*, 25 R. 889 ; and see *Daniel Stewart's Hospital*, 17 R. 1077 ; *Dryburgh*, 7 F. 1083.

3 *White*, 9 R. 375 ; aff. 10 R. (H.L.) 45 ; *Gray* (O.H.), 2 S.L.T. 187.

4 See *Smith*, M. 15,266.

5 See White, *supra*, and *Aspden*, 10 Ch. App. 394.

6 *Anderson*, 2 F. 780 ; *Bank of Scotland*, 18 R. 957.

7 See, *e.g.*, *Pickett* (O.H.) 13 S.L.T. 440.

8 See, *e.g.*, *M'Lean*, 12 S.L.T. 117.

9 *M'Elroy*, 4 F. 885 ; *Strathallan*, 5 D. 1318. As to superior's right to sell superiority, see p. 132, *infra*.

10 Bell's Prin. 701.

contingent irritancy for enforcing payment of feu-duties,"[1] than a casualty. This irritancy was introduced by the Statute 1597, c. 250, which provides that if any vassal or feuar "failzie in making of payment of his few-dewty . . . be the space of twa zeires haill and togidder, they sall amitte and tine their said few of their saids lands, conforme to the civill and cannon law, siklike and in the same manner as gif ane clause irritant were specially ingrossed and insert in their saids infeftmentes of few-ferme." Notwithstanding this enactment, it is not uncommon to find in feu-charters a conventional irritancy *ob non solutum canonem*. To enforce the irritancy, whether based on the Statute 1597, c. 250, or on a conventional clause, it is necessary to raise an action of declarator.[2] Under the Act of 1887,[3] the irritancy may be purged at any time before an extract of the decree has been recorded in the appropriate Register of Sasines. If a feu-right is irritated *ob non solutum canonem*, whether in virtue of an irritant clause or under the Act 1597, c. 250, the superior cannot claim arrears of feu-duty,[4] but he takes the land free from all burdens imposed on it by the vassal without his consent, and unaffected by any subfeu-right granted without his consent.[5]

Purging irritancy.

Effect of irritating feu-right *ob non solutum canonem*.

Notwithstanding any sub-feu granted by a vassal of the whole or part of his lands, every part of the lands remains burdened with the whole of the feu-duty. As the effect of this tends to prevent subinfeudation, the vassal may arrange with the superior for the insertion, in the feu-right to be granted in his favour, of a clause assenting to a proportion of the *cumulo* feu-duty being allocated on each part of the lands in the event of the vassal's subfeuing or otherwise disponing his lands in separate parcels.[6] When the superior assented to apportion the *cumulo* feu-duty and to restrict the amount of feu-duty eligible from each different part of the feu to a certain sum, the allocation

Provisions for allocation of feu-duty.

[1] Bell's Lect. i. 625.

[2] *Lockhart*, 2 Ross' L.C. 244, M. 7244; Bell's Prin. 701.

[3] 50 & 51 Vict., c. 69.

[4] *Magistrates of Edinburgh*, 12 S. 593; *M'Vicar*, M. 15,095.

[5] *Cassels*, 12 R. 722; *Sandeman*, 10 R. 614, rev. 12 R. (H.L.) 67; and on irritating feu, see further *Maxwell's Trs.*, 20 R. 958; *Caledonian Railway Co.*, 2 R. 917; *Thom*, 1886, 13 R. 1026; *Somervell* (O.H.), 9 S.L.T. 344; *Nelson's Trs.* (O.H.), 9 S.L.T. 369; *Wingate's Trs.* (O.H.), 29 S.L.R. 406.

[6] See *Nelson's Trs.*, 6 F. 475; *Campbell*, 17 R. 661; *British Linen Co.* (O.H.), 11 S.L.T. 756; *Kemp* (O.H.), 3 S.L.T. 127.

was carried out, prior to 1874, by a writ by progress or charter of *novodamus* from the superior, which contained a *reddendo* setting forth the feu-duty and casualties to be paid in time to come in respect of the ground to which it applied.[1] The allocation will now be carried into effect either by a charter of *novodamus* or, preferably, by a memorandum of allocation of feu-duty, in terms of section 8 of the Conveyancing Act, 1874, endorsed on the deed in favour of the sub-feuar or disponee either before or after its recording in the Register of Sasines, and signed by the superior or his commissioner.

Stipulations as to buildings.

In a feu-charter, a feu-contract, or a disposition there are very often conditions, positive or negative, about the erection of buildings on the lands disponed. These conditions may have as their object either the giving of security for payment of the feu-duty or the preservation of the amenity of the subjects. For example, there may be a condition binding the disponee to erect within a certain time buildings capable of yielding a rent equal to a certain sum, or to build houses of a certain value, etc.[2] Clauses restricting the use of property on the part of a proprietor are strictly construed, the law being in favour of freedom of ownership.[3] Unambiguous words, however, in such clauses will receive their full effect.[4] That building restrictions, as well as other restrictions, can be imposed on a disponee by means of plans is undoubted; but the mere exhibition of plans to intending feuars is not of itself sufficient to impose any obligation on them to act in conformity with the plans. A reference to a plan, *e.g.* a general feuing-plan, in the titles of property will not, if the reference is only for the purpose of identifying the subjects, be construed as binding the proprietors to build in accordance with it. Before a plan can have the effect of binding parties to build in conformity with it, the plan must be shown by the titles to be part of the contract between the parties.[5] An important question has often arisen in connection with building restrictions as to whether a person

Reference to plans.

Enforcement of restrictions by co-feuars.

1 Bell's Prin. 697.

2 See H.R. 137, and cases there cited.

3 See, *e.g.*, *The Walker Trs.*, 4 F. 594; *Wyllie*, 1 F. 982; *Miller*, 15 R. 991; *Assets Co.*, 24 R. 400, H.R. 138.

4 See, *e.g.*, *Hill*, 2 F. 799; *Miller*, 23 R. 557.

5 *Barr*, 16 D. 1049; see H.R. 138.

who was not a party to the deed constituting them has a *jus quæsitum* to force implement of them. The fact that there are several feuars of adjoining plots of building ground in the same street holding from a common superior does not, by itself, entitle any one of the feuars to insist on the observance of restrictions in the feu-rights of another.[1] To entitle one of such feuars so to insist there must be some mutuality and community of rights and obligations otherwise established between them; and such mutuality and community of rights and obligations can be established (*a*) by express stipulation in their respective contracts with the superior, or (*b*) by reasonable implication from some reference in the contracts to a common plan or scheme of building, or (*c*) by mutual agreement between the feuars themselves.[2] Where the principal party to an action has no right or title whatever, the consent and concurrence of the party (*i.e.* the superior) to whom alone such right or title belongs does not cure the defect of title in the principal party to the action.[3]

Abandonment of building restrictions.

The superior's consent to discharge a condition in his favour cannot affect a *jus quæsitum* therein in a feuar, nor does a feuar's renunciation of his right to enforce the condition prevent the superior from enforcing it;[4] but when the superior has reserved power to dispense with a restriction, there is no mutuality of rights among vassals so as to entitle one of them to found on the restriction as against a co-vassal.[5] Superiors, and feuars having a *jus quæsitum* to enforce restrictions, may be barred from objecting to infringement of building conditions (*a*) by acquiescence in such circumstances as may infer consent to the buildings or alterations in question;[6] (*b*) by express or tacit abandonment of the conditions;[7] (*c*) by compulsory surrender of the servient tenement under Act of

[1] See *Kerridge*, 5 F. 283; *MacRitchie's Trs.*, *infra*.

[2] *MacRitchie's Trs.*, 7 R. 384; rev. 8 R. (H.L.) 95; and see *Stevenson*, 23 R. 1079, 1 F. (H.L.) 91.

[3] *MacRitchie's Trs.*, *supra*.

[4] See *Dalrymple*, 5 R. 847; *Hill*, 2 F. 799.

[5] *Turner*, 17 R. 494; and see Lord Watson in *Earl of Zetland*, 9 R. (H.L.) 40, 47.

[6] *Campbell*, 6 M. 943; *Muirhead*, 2 M. 420; *M'Gibbon*, 9 M. 423; *Robertson's Trs.*, 7 F. 580; *Mactaggart*, 1907, S.C. 1318.

[7] See *Brown*, 2 S. 298; *Earl of Moray*, 4 D. 1411; *Fraser*, 4 R. 942; *Calder*, 13 R. 623; *Johnston*, 20 R. 539; Rankine on Land Ownership, p. 419.

Parliament;[1] or (*d*) by want of interest.[2] But if a superior seeks to enforce a building condition the onus is on the vassal, if he objects to its enforcement, to show that any legitimate interest which the superior may originally have had in maintaining the condition has ceased to exist;[2] whereas a vassal seeking to enforce such a condition must aver and prove a distinct patrimonial interest for doing so,[3] although a very slight interest is sufficient.[4] Tacit abandonment will not be inferred from superiors or vassals permitting either slight deviations or such deviations as they had no interest to prevent.[5]

Real burdens.

In the form of the feu-charter given above,[6] it will be noticed that the conditions, restrictions, or qualifications of the grant are declared real and preferable burdens. Sometimes the clause declaratory of these burdens is fenced by an irritant clause, and sometimes by both an irritant and a resolutive clause. An irritant clause is one by which rights granted in contravention of a condition are declared null; a resolutive clause is one which forfeits the rights of the contravener.

Clauses, irritant and resolutive.

Real burdens are those burdens which affect the lands themselves, and not the grantee and his heirs alone, and which run with the lands. A *real burden*, in the strictest sense of the expression, is a reserved money payment out of the lands contained in an original grant or in a deed of transmission of land, and cannot be enforced by a personal action in the absence of an obligation for payment specially undertaken. In the absence of such an obligation, it is only enforceable against the lands by real diligence. But a *real condition*, as distinguished from a real burden in an original grant of lands, can be enforced by personal action against the proprietor of the lands for the time being. An example of

Real conditions as opposed to real burdens.

[1] Rankine on Land Ownership, p. 419.

[2] *Earl of Zetland*, 8 R. 675; rev. 9 R. (H.L.) 40; *Magistrates of Edinburgh*, 20 D. 156; *Calder*, 1 F. 491; *Menzies*, 2 F. 953; *Forrest*, 8 F. 341; *Marquis of Linlithgow* (O.H.), 11 S.L.T. 486; and see *Cheyne* (O.H.), 7 S.L.T. 276.

[3] *Beattie*, 3 R. 634; *Stewart*, 5 R. 1108.

[4] See Lord Gifford in *Stewart*, 5 R., at p. 1115.

[5] See *Stewart*, *supra*; *Ewing*, 5 R. 230; *Johnston*, 24 R. 1061; *Mactaggart*, 1907, S.C. 1318.

[6] See p. 29.

a real condition in this sense is a condition in a feu-charter regarding the erection of buildings. Those in right of such a condition have the power to insist on its implement by raising a personal action against those who are bound by it. Thus, where a piece of ground is feued on the condition, made a real burden, that the vassal should erect certain buildings within a specified time, the grant imposes (*a*) a personal obligation on each successive vassal in the feu to erect the buildings, and, (*b*), in the event of non-implement, liability to pay damages. This liability for damages attaches to any vassal in default and his executors, even although the property, prior to the date of action, has been conveyed to a new vassal. Nor is the superior barred from insisting in his conclusions for damages because he has taken, in an action for implement against the proprietor for the time being, or alternatively for damages against him and his predecessors in the feu, a decree *ad factum præstandum*, which has not been implemented.[1]

Essentials of a real burden for the payment of money.

The essentials of a real burden valid against singular successors for the payment of a sum of money are these:—(1) *The amount must be definite.*[2] But if a burden is really one *ad factum præstandum* capable of running with the lands, it may be made valid against singular successors as an inherent condition of a feudal grant, although it may indirectly and practically resolve itself into the payment of an indefinite sum.[3] (2) *The creditor in the burden, who may be either one of the parties to the deed or a stranger, must be identified.*[4] A real burden may, however, be constituted in favour of, *e.g.*, the unnamed children of a particular person.[5] (3) *The burden must appear in the dispositive clause of the deed constituting it,*[6] *and must be declared in words which clearly express or plainly imply that the lands themselves are to be affected by it, and not the*

[1] *Rankine*, 4 F. 1074; *Marshall*, 22 R. 954, 23 R. (H.L.) 55; and *Macrae*, 19 R. 38.

[2] *Tailors of Aberdeen*, 13 S. 226; aff. 1 Rob. 296, 3 Ross' L.C. 269; *M'Donald*, Hume, 544; *Broughton's Crs.*, M. 10,247; *Stenhouse*, M. 10,264; *Erskine*, 8 D. 863; *Magistrates of Edinburgh*, 11 R. 352; *Forbes*, 21 R. 630, p. Lord Low.

[3] *Clark*, 12 D. 1047; rev. 17 D. (H.L.) 27; 1 Macq. 668; and see *Marshall*, *supra*; *Edmonstone*, 16 R. 1.

[4] 1 Bell's Com. 730.

[5] See *Erskine*, 8 D. 863; and comp. *M'Donald*, Hume, 544.

[6] Bell's Prin. 920; and see Lord Shand in *Cowie's Tr.*, 20 R. (H.L.), at p. 87; *Wilson*, Feb. 13, 1822, F.C.; aff. 2 S. App. 162.

grantee and his heirs alone,[1] *and the lands must be definitely specified either in the constitutive deed or in a notarial instrument following on it.* (4) *The clause constituting the burden must appear in the investiture and in the appropriate Register of Sasines, unless the burden is an inherent condition of the grant.*[2]

Essentials of a real burden not for the payment of money.

The essentials of a real burden other than for the payment of money are as follows:—(1) *Words must be used which clearly express or plainly imply that the lands themselves are to be affected, and not the grantee and his heirs alone.*[3] (2) *The clause constituting the real burden or condition must appear in the investiture and in the appropriate Register of Sasines, unless the burden is an inherent condition of the grant.*[4] (3) *The burden or condition must not be either* (a) *contrary to law*; or (b) *inconsistent with the nature of the species of the property disponed*; or (c) *useless or vexatious*; or (d) *contrary to public policy*;[5] or (e) *too vague in its terms.*[6] (4) *The superior, or the party in whose favour it is conceived, must have an interest to enforce it.*

Constitution of real burden or condition.

If the essentials mentioned above concur, it is not necessary in the constitution of a real burden or condition that any *voces signatæ* or technical form of words should be employed; nor is it necessary to have a declaration that the obligation is real, or that it is a *debitum fundi*, or that it shall be inserted in all future infeftments, or that it shall attach to singular successors, or to fence the obligation with an irritant clause, or with irritant and resolutive clauses. If a burden is personal, an irritant clause will not make it real;[7] but an irritant clause may afford the means of construing a condition, and the presence of such a clause may be one reason for presuming, in the construction of a condition which is ambiguous in its terms, that the granter of the deed in which the condition occurs meant the condition to apply not only to the grantee and his heirs, but also to singular successors.

[1] Lord Corehouse in *Tailors of Aberdeen*, 1 Rob., at p. 306; and cases cited in H.R. 150.

[2] *Ibid.*

[3] Lord Corehouse in *Tailors of Aberdeen*, *supra*; see *Campbell's Trs.*, 4 F. 752.

[4] Lord Corehouse in *Tailors of Aberdeen*, *supra*; *Glen* (O.H.), 13 S.L.T. 898.

[5] *Ibid.*; *Yeaman*, M. 14,537; *Orrock*, M. 15,009.

[6] *Murray's Trs.*, 1907, S.C. (H.L.), 8.

[7] *Allan*, M. 10,265; aff. 2 Pat. 572.

Besides, one in right of a real burden or condition fenced with an irritant clause has a powerful remedy in case of contravention; for he can raise an action of declarator to have it found that, in respect of the contravention and the irritant clause, the right of the proprietor in possession is at an end.[1]

Inherent conditions.

Burdens which are inherent conditions of a feudal grant require neither to be declared real nor to appear on record. Such burdens run with the lands, and are perpetual qualifications affecting both the original superior and vassal, and their respective heirs and singular successors.[2] It would appear that, if a stipulation or condition in a feu-right has the qualities of permanency, of immediate connection with the estate, and of natural connection with the object of the deed, it is an inherent condition of the tenure.[3]

Feuar possessing on personal title.

The rules which have been stated with regard to real burdens or to real conditions valid in law against singular successors, apply only when infeftment has once been taken. So long as the title remains personal, an heir or assignee must take it subject to the burdens which were binding on the original disponee, in respect that he cannot both plead the personal title and repudiate its conditions.[4] The original disponee or his heirs are, both before and after infeftment, bound by all the lawful conditions of the grant, even although they may offer to prove that the superior has no interest to enforce them.[5]

Real burdens can be imported by reference in statutory form.

At one time a reference to burdens was not sufficient to make them effectual against creditors or singular successors, but now, instead of setting forth particularly the real burdens or real conditions effeiring to lands in a conveyance thereof, it is competent to import them into the conveyance by reference in

[1] See Lord Corehouse in *Tailors of Aberdeen*, 1 Rob., at p. 315.

[2] Ersk. 2, 3, 11; and see *Stewart* v. *Duke of Montrose*, 22 D. 755; aff. 4 Macq. 499 (clause of relief against augmentations of stipend in feu-contract held to run with lands without special assignation); *Hope*, 2 M. 670 (singular successor in superiority held bound to insert in renewal of investiture obligation of relief from public burdens, although not warned by records of such a burden); and comp. *Speirs*, 4 F. 1069.

[3] See Lords Deas and Shand in *Marquis of Tweeddale's Trs.*, 7 R. 620; and Lord Ardmillan in *Robertson*, 1 R. 1213, at p. 1220.

[4] *Preston*, M. App. Personal and Real, No. 2; Bell's Lect. i. 617.

[5] *Waddell*, 25 R. 456.

statutory form. (1) The Lands Transference Act, 1847,[1] made it competent to omit the full insertion of real burdens, etc. in deeds necessary to transmit, renew, or complete the feudal title to lands not held by burgage tenure, provided that they were specially referred to in a prescribed form[2] as set forth at full length in the recorded instrument of sasine wherein they were first inserted, or in any recorded instrument of sasine of subsequent date forming part of the progress of titles of the lands, the instrument having to be described by the name of the party in whose favour it was expede, the register in which it was recorded, and the date of registration. (2) The Lands Transference Burgage Act, 1847,[3] similarly made it sufficient to refer in a prescribed form[4] to the burdens, etc., as set forth at full length in the recorded instrument of resignation and sasine in which they were first inserted, or in any recorded instrument of resignation and sasine, or of cognition and sasine, of subsequent date, and forming part of the progress of titles of the lands, the instrument being described by the name of the party in whose favour it was expede, and the date of registration in the burgh register. (3) The Heritable Securities Act, 1847,[5] contained similar provisions with regard to the importing of real burdens, etc., in bonds and dispositions in security, making a reference to a recorded instrument containing the burdens at full length sufficient. (4) The Crown Charters Act, 1847,[6] made the importation of burdens by reference to prior recorded instruments competent in like manner in the case of Crown Charters and precepts and the instruments of sasine following on them. (5) The Service of Heirs Act, 1847,[7] made it competent, in cases of special service, to omit in the petition of service, and in the decree of service to follow thereon, and in the precepts, sasines, or other instruments necessary to complete the investiture, the full insertion of real burdens, etc., provided they were therein specially and directly referred to as set forth at full length in the recorded

Repealed enactments as to importing burdens by reference.

1 10 & 11 Vict., c. 48, s. 5.
2 Schedule (C).
3 10 & 11 Vict., c. 49, s. 4. Schedule (C).
5 10 & 11 Vict., c. 50, s. 4.
6 10 & 11 Vict., c. 51, s. 27, schedule (C).
7 10 & 11 Vict., c. 47, s. 6, schedule (B).

instrument of sasine in favour of the deceased person served to, or as set forth at full length in the recorded instrument of sasine or of resignation *ad remanentiam* of the said lands in which they were first inserted, or in any other intermediate recorded instrument of sasine. (6) By the five preceding enactments the deed to which reference was made for real burdens had to be a duly recorded instrument of sasine forming part of the progress of titles; but it was made lawful by the Titles to Land Burgage Act, 1860,[1] to make reference to the real burdens, etc., as set forth at full length in any conveyance or notarial instrument recorded in the appropriate Register of Sasines of the lands to which such real burdens, etc., applied.

Enactments of Titles to Land Consolidation Act, 1868, as to importing real burdens by reference.

The enactments of the six statutes just cited were repealed, and with some alterations re-enacted, by section 10 of the Titles to Land Consolidation Act, 1868.[2] That section provided that it should not be necessary in any conveyance or deed of or relating to lands held under real burdens appointed to be fully inserted in the investitures, to insert such real burdens, provided they were specially referred to in the form provided by the Act,[3] as set forth at full length in the recorded conveyance or deed of or relating to such lands, in which they were first inserted, or in any recorded conveyance or deed of subsequent date, forming part of the progress of titles of the said lands.

Enactments of Conveyancing Act, 1874, as to importing real burdens by reference.

The Conveyancing Act, 1874,[4] repealed the former enactments dealing with the subject, and enacted (1) that real burdens, etc., affecting lands may be imported into *any* deed (including original grants of land) relating to such lands by reference to a duly recorded deed applicable to such lands, or to the estate of which such lands form a part, in which the real burdens, etc., are set forth at length; and (2) that a proprietor may record in the Register of Sasines appropriate to his lands a deed setting forth real burdens, etc., under which he is to feu, or otherwise deal with or affect his lands, or any part thereof, and that the same may be imported, in whole or

1 23 & 24 Vict., c. 143, s. 31.
2 31 & 32 Vict., c. 101.
3 Schedule (D).
4 37 & 38 Vict., c. 94, s. 32, schedule (H).

in part, by reference, into any deeds, including original grants as well as deeds of transmission relating to the lands.

Methods for securing insertion of real burdens.

When the precept of sasine was in use, and infeftment was taken by expeding and recording an instrument of sasine, insertion of the burdens in the sasine was secured by making them a part of the precept of sasine. To ensure the insertion in the Register of Sasines of real burdens contained in any conveyance of lands various methods can now be adopted. (1) The disponer may direct the burdens to be inserted in any notarial instrument to follow thereon, and to be inserted or validly referred to in all future deeds of transmission, decrees, instruments, or other writs of or relating to the subjects disponed, or any part thereof, and may follow this direction with a clause of irritancy declaring that otherwise all such deeds, decrees, and instruments shall be void and null.[1] (2) The direction to have the real burdens duly inserted on record may be followed not only by an irritant clause, but also by a resolutive clause. (3) The Titles to Land Consolidation Act, 1868,[2] provides that, immediately before the testing clause of any conveyance of lands, it shall be competent to insert a clause of direction,[3] specifying the part or parts of the conveyance which the granter desires to be recorded in the Register of Sasines; and that when a conveyance containing such a clause, with a warrant of registration[4] making reference to the clause, is presented for registration, the keeper shall record such part or parts only, together with the clause of direction and the testing clause and warrant of registration. In the absence of such reference in the warrant of registration, the conveyance has to be engrossed in the register as if it had contained no clause of direction. It is declared competent for the person entitled to present the conveyance for registration to record the whole conveyance, or to expede and record a notarial instrument thereon, as if the conveyance had contained no clause of direction; *but where a notarial*

1 31 & 32 Vict., c. 101, s. 146, re-enacting 21 & 22 Vict., c. 76, s. 29, and 23 & 24 Vict., c. 143, ss. 17 and 31.

2 S. 12; re-enacting with slight alterations 21 & 22 Vict., c. 76, s. 3, and 23 & 24 Vict., c. 143, ss. 5 and 25.

3 Schedule (F), No. 1.

4 Schedule (F), No. 2.

instrument is expede no part or parts of the conveyance directed to be recorded must be omitted from it. By inserting in a conveyance such a clause directing that the part constituting the real burdens shall be recorded in the Register of Sasines, the insertion of the burdens in a notarial instrument following on the conveyance is secured. (4) Another method sometimes adopted is to stipulate that the whole conveyance shall be recorded in the appropriate Register of Sasines within a short period, and that the conveyance prior to such recording shall not be assignable to any person or persons, or available as a warrant for any notarial or other instrument.[1] (5) There may be a combination of the methods (1), (2), and (4), as shown in the Juridical Styles,[2]—*i.e.* a direction, fenced by an irritant as well as a resolutive clause, to insert the real burdens in the infeftment to follow on the conveyance, and to insert or duly refer to them in all future transmissions and other writs relating to the subjects, and a stipulation that the whole conveyance shall be recorded in the appropriate Register of Sasines within a certain period, and that it, prior to such recording, shall not be assignable or available as a warrant for any notarial or other instrument.

III. Term of Entry.

III. Term of Entry.—Before the Lands Transference Act, 1847, the term of entry was contained in the clause of assignation of rents. Since 1847, however, the statutory form of the clause of entry has been—"With entry at the term of ."[3] But where no term of entry is stated, the entry is at the first term of Whitsunday or Martinmas after the date or last date of a conveyance, unless it appears from the terms of the conveyance that another term of entry was intended.[4]

IV. *Tenendas.*

IV. Tenendas.—The object of this clause in a feu-right is (1) to point out the superior, and (2) to specify the tenure. The holding under an original grant is, and has always been, a holding *de me*. Whilst the *tenendas* is not a conveying clause, it may in some cases raise a presumption in favour of the

[1] Jur. Styles, 5th ed., i. 26; Bell's Lect. i. 616.
[2] 5th ed., vol. i. 25.
[3] 31 & 32 Vict., c. 101, s. 5, and schedule (B), No. 1, repeating 10 & 11 Vict., c. 48, s. 1 schedule (A).
[4] 37 & 38 Vict., c. 94, s. 28.

disponee, so as to entitle him to establish a right by evidence of possession.[1]

V. Reddendo. V. *Reddendo.*

V. REDDENDO.—This clause specifies the payments or other prestations to be made by the vassal to his superior. In feus granted after the commencement of the Conveyancing Act, 1874, the annual feu-duty must be of fixed amount or quantity; but it is lawful to condition or stipulate for a permanent increase or reduction of the feu-duty, provided (*a*) that the amount of such increase or reduction is certain, and (*b*) that the time or times from and after which such increase or reduction is to have effect are also certain.[2] Further, in such feus no casualties or duties are by law, irrespective of express condition or covenant, payable to the granter of the feu or his successors in the superiority; and it is not lawful to condition or stipulate for any casualty to be paid on the succession of an heir or the acquisition of a singular successor. It is, however, lawful to condition or stipulate for payment of a casualty in the form of a periodical fixed sum or quantity, provided (*a*) that such periodical additional sum or quantity is certain, and (*b*) that the time or times at which such additional sum or quantity shall be exigible are also certain. In consequence of the provisions of section 23 of the Act of 1874, it is not uncommon in practice for superiors to stipulate in feu-rights for payment of a duplicand of the feu-duty payable at intervals of a certain number of years. Such a stipulation is inserted at the end of the clause of *reddendo.*

Feu-duty since 1874 must be of fixed amount or quantity.

In feus granted after 1874 no casualties due *ex lege.*

In all cases where superiors had prior to the passing[3] of the Act agreed to feu land, but had not prior to the commencement[4] thereof granted the feu-rights, it was left competent to stipulate in the feu-rights for payment of the casualties which the vassals might expressly or by force of law have agreed to, in the same manner as might have been done prior to the commencement of the Act. It was, however, put in the option of either superiors or vassals to have such casualties converted

Case of feu-rights stipulating for or inferring payment of casualties contracted for but not granted before 1874.

[1] See Lord Colonsay in *Lord Advocate*, 3 M. 981 at p. 992; aff. 5 M. (H.L.) 97; and see *Lord Advocate*, 2 R. 27.

[2] S. 23; and see *M'Farlane*, 3 F. 933; rev. 5 F. (H.L.) 1.

[3] 7th August 1874.

[4] 1st October 1874.

into annual sums equal to four per cent. on the amount of the price of the redemption of the casualties, ascertained in the way provided in section 15 of the Act, and these annual sums were to be deemed feu-duties additional to any feu-duties expressly contracted for.[1]

Feu-duty before 1874.

Before the passing of the Conveyancing Act, 1874, parties to feu-rights could stipulate for payment of feu-duties in almost any way agreeable to them. It was not then essential that they should be of fixed amount or quantity. For many years before 1874, however, the *reddendo* in feu-rights was usually a payment in money or grain. By the Clan Act[2] *quasi*-military services, such as hosting, hunting, watching and warding, were abolished, and compensation therefor was provided to superiors. This Act did not make it incompetent to stipulate in a feu grant for the rendering of services which were not military or *quasi*-military in their nature. Accordingly a vassal was held bound to uphold a boat of six oars, and to provide it with six rowers and a steersman, for the use of the superior and his family, and to keep the mansion-house wind- and water-tight,[3] and another vassal was held bound to deliver a certain quantity of peats at a particular castle, although it had fallen into ruins, and although there were no mosses yielding peats on the vassal's lands.[4] In feus in which the performance of agricultural services and carriages are stipulated for, the law is that these are only exigible if demanded within the year.[5] Arrears of payment in kind may, however, be exacted at any time within the years of prescription, and such arrears are payable either in kind or at the market prices of the several years in which they fall due.[6] If the feu-duty is payable in kind, as, *e.g.*, grain, it is, in the absence of a contrary stipulation, demandable in kind, whether the lands feued produce it or not;[7] or, alternatively, the superior is entitled to its value, calculated at the highest fiars

Services which Clan Act did and did not abolish.

Arrears of agricultural services or of payments in kind.

Where feu-duty payable in kind.

[1] 37 & 38 Vict., c. 94, s. 24. The subject of casualties under old feus is treated at p. 74 *infra*.

[2] 1 Geo. I., stat. 2, c. 54, ss. 10, 11, and 12; Act of Sederunt, March 10, 1756.

[3] *Duke of Argyle*, M. 14,495.

[4] *Monro*, M. 14,497.

[5] *Young*, M. 13,071; *Hope*, 10 M. 347.

[6] *Duke of Hamilton*, 14 S. 162; aff. 2 S. & M'L. 586; *Hope, supra*.

[7] *M'Leod*, 5 Br. Sup. 615, 2 Pat. 430; *Duke of Hamilton, supra*; Bell's Prin. 694; *Treasurer of Edinburgh*, M. 4188.

prices current, by way of penalty, and the vassal is under obligation to carry it to the superior if he is within the barony.[1]

Where payment of feu-duty alternative.

If the obligation for payment of feu-duty is alternative, as, for instance, when the vassal is bound to pay a sum of money or deliver a quantity of grain, the option is with the vassal, unless it is given to the superior, or unless the delivery has become impresta ble, or has been so long delayed that the superior is not bound to take it.[2]

Interest on feu-duty.

Interest is not due on feu-duty *ex lege*, but it may be, and now invariably is, stipulated for; and, apart from stipulation, it runs from the date of a judicial demand for payment.[3]

Commutation of carriages and services under feu-rights.

By sections 20 and 21 of the Conveyancing Act, 1874, provision has been made for commutation of carriages and services, stipulated for under feu-rights, at the instance of either the superior or the vassal, into additional feu-duty.

Nature of feu-duty.

The feu-duty is a real and preferable burden—a *debitum fundi*—and consequently a vassal cannot give a right to the lands unless subject to the feu-duty. By means of his real right in the lands the superior has a preference over purchasers in sales, voluntary or judicial, and in rankings of creditors, and this preference extends over the whole lands disponed in feu, however divided by subinfeudation or by sales.[4] To preserve this preference, the feu-duty, which is a real burden *inter naturalia* of the grant, does not require to enter the record, and in this respect it differs from an ordinary real burden.[5]

Means of recovering feu-duty.

A superior has various methods for enforcing payment of feu-duty:—(1) *Personal Action.*—The vassal, after accepting a feu, cannot renounce it *invito superiore*, even as regards future feu-duties.[6] By his acceptance of the feu he makes himself personally liable for payment of the feu-duties and performance of the whole obligations of the feu. To enforce this liability the superior can raise a personal action against him. When the vassal in a feu-right was bound in the ordinary way—that is,

(1) Personal action.

When vassal's liability for feu-duty ceases.

1 *Treasurer of Edinburgh*, *supra*.

2 See Bell's Prin. 696.

3 *Marquis of Tweeddale*, 4 D. 862; *Marquis of Tweeddale's Trs.*, 7 R. 620; *Napier*, 3 Ross' L.C. 109. Interest not due on ground-annuals *ex lege*,—*Moncrieff*, 3 Ross' L.C. 109.

4 See Bell's Prin. 697, and authorities there cited; but see *Nelson's Trs.*, 6 F. 475.

5 See Bell's Lect. ii. 1156.

6 *Hunter*, 13 S. 205.

when he and his heirs and assignees were bound to make payment of the feu-duty—his liability for payment ceased, under the law as it stood prior to the Conveyancing Act, 1874, on the entry *habili modo* of his disponee with the superior.[1] Under that Act[2] infeftment now implies entry with the nearest superior whose estate of superiority would, according to the law existing prior to the commencement of the Act, have been not defeasible at the will of the proprietor so infeft,[3] whether the superior's own title or the title of any over-superior has been completed or not. The implied entry of a disponee, however, does not *per se* relieve the last entered vassal, in a question with the superior, of liability for the feu-duty. To relieve the last entered vassal, bound in the ordinary way in a feu-right, there requires to be not only (*a*) the infeftment of his disponee, but also (*b*) notice of change of ownership to the superior.[4] If the last entered vassal has had, in consequence of failure to give notice to the superior, to pay feu-duty properly payable by his successor in the feu, he is entitled to recover from the entered vassal, and for this purpose he has all the remedies of the superior for recovery of feu-duty. Before 1874, an entry by a superior to a disponee implied, in the absence of stipulation or reservation to the contrary, a discharge of all bygone feu-duties and casualties.[5] To prevent an implied entry under the Conveyancing Act, 1874, from operating as such a discharge, section 4 (3) of the Act enacts that such implied entry shall not affect the right of any superior to any casualties, feu-duties, or arrears of feu-duties which may be exigible in respect of the lands at or prior to the date of such entry; and that all rights and remedies competent to a superior under the existing law and practice or under the conditions of any feu-right, for recovering, securing, and making effectual such casualties, feu-duties, and arrears, or for irritating the feu *ob non solutum canonem*, and all the obligations and conditions in the feu-rights prestable to or exigible by the superior, in so far as the same

Implied entry does not affect superior's rights to feu-duties or casualties.

[1] *Hyslop*, 1 M. 535.

[2] S. 4 (2).

[3] *I.e.* excluding mid-superiors of whom the vassal holds *a me vel de me*.

[4] Schedule (A).

[5] *Tailors of Glasgow*, 13 D. 1073; *Lord Advocate*, 10 M. 1024; and see Lord Kinnear in *Marshall*, 22 R., at p. 962.

may not have ceased to be operative in consequence of the provisions of the Act or otherwise, shall continue to be available to the superior in time coming.

Heirs and executors not liable for feu-duty after vassal's death, if estate not taken up.

Where a vassal is bound for feu-duty in the ordinary way under a feu-right, his executors are not bound to take up the feu after his death, even if his heir declines to do so, nor are they liable for feu-duties accruing after the date of the vassal's death. If the obligation to pay feu-duty is laid upon the vassal himself and his heirs, executors, and successors whomsoever, this is held as imposing liability on the executors only for the period up to the vassal's death.[1] But in a feu-right a vassal may so bind himself and his representatives as to render himself and his estate, notwithstanding a transmission of the feu, liable in perpetuity for the feu-duty to the superior. Thus, if in a feu-right a vassal binds himself, his executors and successors, *conjunctly and severally*, to pay the feu-duty,[2] or if he grants, in addition to an obligation in ordinary form for payment, a separate personal bond binding himself and his representatives, although not conjunctly and severally, for payment of the feu-duty,[3] he and his estate remain liable to the superior in perpetuity for the feu-duty.

Personal action against sub-feuars for feu-duty.

A superior, whose immediate vassal is owing feu-duty to him, can raise a personal action against sub-vassals for payment of the amount of their subfeu-duties, and perhaps, if the obligations come under by them to their own superior are not proportional to the portion of the original subject sub-feued to them, as compared with the original *cumulo* feu-duty, for payment of an amount of the *cumulo* feu-duty which corresponds to the extent of the sub-feu.[4]

Rights of one paying feu-duty for another.

Where a person pays feu-duty, for which he is not liable *in toto* in a question with his co-owners of an original feu,[5] he has recourse against them

[1] *Aiton*, 16 R. 625; but see p. 48, *supra*, on obligations *ad facta præstanda*.

[2] *Police Commissioners of Dundee*, 11 R. 586 (a case of a feu-contract); see remarks on this case in *Aiton*, *supra*; and see also *Small*, 11 D. 495; rev. 1 Macq. App. 345; *Burns*, 12 R. 1343; rev. 14 R. (H.L.) 20.

[3] *King's College of Aberdeen*, 14 D. 675; rev. 1 Macq. App. 526; *Brown's Trs.*, 14 D. 675; rev. 2 Macq. App. 40.

[4] See *Sandeman*, 8 R. 790; *Hyslop*, 1 M. 535; *Marquis of Tweeddale's Trs.*, 7 R. 620; and H.R. 176.

[5] On relief, see *City of Glasgow Bank*, 9 R. 689; *Auld* (O.H.), 6 S.L.T., No. 111; and see also *Macindoe's Trs.* (O.H.), 24 S.L.R. 477; and *Nelson's Trs.*, 6 F. 475.

for their share of the feu-duty, but he is not entitled to such an assignation from the superior of his remedies for enforcing payment as will have the effect of allowing the feu-duty paid to remain a charge on the feu.[1] (2) *Superior's hypothec for feu-duty.*—A superior has a hypothec for recovery of his feu-duties, not only over the produce and stock of agricultural and pastoral subjects, but also over *invecta et illata*,[2] and where the subjects are let, the superior's right prevails, because the landlord cannot let his land otherwise than under burden of the feu-duties.[3] (3) *Declarator of irritancy ob non solutum canonem.*—This remedy has already been dealt with.[4] Whilst the vassal has a right to retain feu-duties so long as an essential condition of the feu remains unperformed by the superior,[5] it is not a valid defence to an action of declarator of irritancy *ob non solutum canonem* that there is a dispute between the superior and the vassal, *e.g.*, as to the vassal's right to erect certain buildings.[6] (4) *Action of poinding of the ground.*—The superior can poind the moveables on the lands, whether the property of the debtor or his tenants, for the feu-duties, or for the casualty of relief, or for a taxed composition due to him.[7] The moveables, however, of tenants are only liable to the extent of their rents due and unpaid.[8] Unlike a heritable creditor, who can use the remedy of poinding the ground, or that of maills and duties, or both,[9] a superior cannot resort to an action of maills and duties for payment of feu-duties in respect that he has no right to possession, because he is excluded therefrom by his own grant.[10] As poinding of the ground cannot be exercised by one having no real right in the land, a superior, after he had parted with his right to the land, was held to have no title to poind the ground for arrears of feu-duty.[11] (5) Where a disponee under a feu-contract assents to

(2) Superior's hypothec for feu-duty.

(3) Declarator of irritancy *ob non solutum canonem*.

(4) Poinding of the ground.

[1] *Guthrie*, 8 R. 107. Note exception to this rule, p. 58, *supra*.

[2] *Yuille*, 2 S. 140.

[3] See Rankine on Leases, 356.

[4] See p. 43, *supra*.

[5] See Bell's Prin. 702, and authorities there cited.

[6] *Thom*, 13 R. 1026; and see *Arnott's Trs.*, 9 R. 89.

[7] See *Crs. of Eyemouth*, 5 Br. Sup. 856, *Morrison's Trs.*, 5 R. 800; *Stewart*, 8 R. 270.

[8] *Brown*, 22 D. 273.

[9] *Henderson*, 2 R. 272; and compare *Scottish Heritable Security Co.*, 3 R. 333.

[10] *Prudential Assurance Co., Limited*, 11 R. 871; *Nelson's Trs.*, 23 R. 1000.

[11] *Scottish Heritages Co. Ltd.*, 12 R. 550.

registration for execution, such disponee, not his heir or singular successor, can be charged summarily for payment of the stipulated feu-duty.[1]

VI. Effect of assignation of writs in statutory form.

VI. Assignation of Writs.—The statutory form of this clause in the transmission of a fee of property already created is —"And I assign the writs, and have delivered the same according to inventory";[2] and it imports, unless specially qualified, "an absolute and unconditional assignation to such writs and evidents, and to all open procuratories, clauses, and precepts, if any, and as the case may be, therein contained, and to all unrecorded conveyances to which the disponer has right."[3] This statutory form is not suited to an original feu-right, in which there is usually inserted a clause of assignation of writs to the effect only of maintaining and defending the right of the grantee, and an obligation on the part of the superior to make them furthcoming on all necessary occasions. Where the vassal is to get right to any special obligation in favour of the superior, such as an obligation of relief from stipend and augmentations of stipend, the right requires to be specially assigned to him.[4] It has also to be observed that what is carried by a clause of assignation of writs in the statutory form in a disposition may vary according to circumstances. If, for example, a superior in feuing grants a clause of relief from minister's stipend and future augmentations thereof in favour of his vassal, and his vassal dispones to a third party, that party will, in virtue of the assignation of writs, get the benefit of the obligation without special assignation thereof to him, on the ground that it is an inherent condition of the original grant, and therefore runs with the lands.[5] But if a vassal in transmitting his feu inserts such a clause of relief in favour of the purchaser, the purchaser will have the benefit of it; but neither the heir of the purchaser (unless he makes up his title by service) nor a disponee of the purchaser is entitled to found

[1] See Wood's Lectures, 161.

[2] 31 & 32 Vict., c. 101, s. 5 and schedule (B); s. 5 re-enacts, with verbal alterations, provisions in 10 & 11 Vict., c. 48, s. 1.

[3] *Ibid.* s. 8, re-enacting, with verbal alterations, 10 & 11 Vict., c. 48, s. 3.

[4] Bell's Lect. i. 690, and authorities there cited.

[5] *Stewart*, 22 D. 755; aff. 1 M. (H.L.) 25; *Lennox*, 5 D. 1357.

on the obligation of relief unless it has been specially assigned, because it is an obligation collateral to and irrespective of the title to the land.[1] By section 50 of the Conveyancing Act 1874, a short form of assignation of obligations or rights of relief, which do not pass under a general assignation of writs in a disposition, has been introduced, and such assignation may be in a separate deed or may form part of another deed.

Form of assignation of collateral rights

By section 19 of the Titles to Land Consolidation Act, 1868, it was enacted that where a person should have granted or should grant a general disposition of his lands, whether by a conveyance *mortis causa* or *inter vivos*, or by a testamentary deed or writing, such disposition should be a sufficient warrant for a notarial instrument in favour of the disponee. But, as it was decided[2] that this enactment did not authorise the use of two or more general dispositions (not containing an assignation of writs) as connecting links of a series of titles, section 29 of the Conveyancing Act, 1874, provided that no decree, instrument, or conveyance dated before or after 1874 should be deemed to be invalid because the series of titles connecting the holder with the person last infeft, contained as links of the series two or more general dispositions, or because any general disposition forming a part of the series did not contain a clause of assignation of writs.

Title by general disposition.

A clause of relief may be so expressed as not to be assignable by the grantee.[3]

VII. Assignation to rents.

VII. Assignation to Rents.—The statutory form of this clause is—"And I assign the rents." This clause, unless specially qualified, is "held to import an assignation to the rents to become due for the possession following the term of entry, according to the *legal* and not the conventional terms, unless in the case of foreband rents, in which case it shall be held to import an assignation to the rents payable at the conventional terms subsequent to the date of entry."[4] Farms, in

Effect of statutory clause.

Farms of two classes.

[1] *Spottiswoode*, 15 D. 458; *Horne*, 3 D. 435; rev. 1 Bell's App. 1; *Sinclair*, 6 D. 378; rev. 5 Bell's App. 353; *Speirs*, 4 F. 1069; see 1 Ross' L.C. 50 *et seq.*

[2] *Smith*, 8 M. 204.

[3] *Orr Ewing*, 11 R. 471; aff. 12 R. (H.L.) 12; and see *Durie's Trs.*, 16 R. 1104; *Latto*, 5 F. 740.

[4] 31 & 32 Vict., c. 101, ss. 5 and 8, and schedule (B), re-enacting 10 & 11 Vict., c. 48, s. 3, 10 & 11 Vict., c. 49, s. 2.

a question of rents, are divided into two classes—(*a*) arable, and (*b*) pastoral; for where a farm is partly arable and partly pastoral it is considered as between seller and purchaser to be arable if the income or profits are chiefly derived from the arable land, and pastoral if the income or profits are chiefly derived from the pastoral land.[1] Whatever be the conventional terms for payment of rent, the legal terms are—(*a*) in the case of arable farms, Whitsunday after the crop is sown, and Martinmas thereafter; and (*b*) in the case of pastoral farms, Whitsunday on entry and Martinmas thereafter. If A lets to B an arable farm with entry at Martinmas 1886; if the first half-year's rent is due by the lease at Martinmas 1887 (*i.e.* the rent is conventionally postponed for six months, the legal term for payment of the first half-year's rent being Whitsunday 1887); if A feus or dispones to C the estate containing the farm, and the conveyance contains a clause of entry as at Martinmas 1888, and an assignation of rents in the statutory form—"And I assign the rents"—then C will get neither the half-year's rent due at Martinmas 1888, because that rent is for the possession for the half-year ending at Whitsunday 1888, nor the half-year's rent due at Whitsunday 1889, because that rent is due for the possession for the half-year ending at Martinmas 1888; but he will be entitled to the half-year's rent due at Martinmas 1889, because that rent is for the half-year's possession from Martinmas 1888 to Whitsunday 1889, and, of course, to all subsequent half-year's rents.[2] But where entry is obtained to a pastoral farm at Whitsunday, and the first half-year's rent is made payable by the lease at the following Martinmas, and the next half-year's rent at Whitsunday thereafter, and the estate of which the pastoral farm forms a part is sold, during the currency of the lease, with entry at Martinmas, under a disposition containing an assignation of rents in the statutory form, then the seller, and not the purchaser, is entitled to the half-year's rent payable at Whitsunday after the date of entry,

Legal terms for payment.

[1] *Petley*, Hume, 186; *M'Clymonts*, 10 D. 1489; *Campbell*, 9 Scot. Jur. 163; *Mackenzie's Trs.*, 2 F. 1278; Rankine on Leases, 318.

[2] See *Penman*, 6 S. 940; *Stevenson* v. *Moncreiff*, 7 D. 418; *Sinclair*, 10 D. 190; *Lady Murray's Trs.*, 3 M. 845; *Lord Glasgow's Trs.*, 16 R. 545; and Rankine on Leases, 328.

because such half-year's rent was legally payable at Martinmas, the date of entry.[1]

Case of shooting rent.

In the case of *Lord Glasgow's Trustees* v. *Clark*,[2] a seller sold lands consisting of two farms, assigning the rents "due and payable from and after the term of entry," and it was held, as regards the rent both of farms and of shootings, that the clause applied to the rents due and payable for the possession from and after the term of entry.

VIII. Obligation to relieve of public burdens.

VIII. CLAUSE OF OBLIGATION TO RELIEVE OF PUBLIC BURDENS, ETC.—The statutory form of this clause in a disposition is—"And I bind myself to free and relieve the said disponee and his foresaids of all feu-duties, casualties, and public burdens"; and, unless specially qualified, is held "to import an obligation to relieve of all feu-duties or other duties and services or casualties payable or prestable to the superior, and of all public, parochial, and local burdens due from or on account of the lands conveyed prior to the date of entry."[3] Whilst the statutory form of the clause may be used in an original feu-right, the form given in the style of the feu-charter above is preferable.[4] The effect of the clause in either form is that the granter of the conveyance is not liable in a question with the grantee in payment of any public burdens imposed on the land, and due for the possession after the date of entry. It is, however, quite competent for a disponer under a disposition to bind himself to relieve his disponee of all casualties in all time coming.[5]

Effect of statutory clause.

Relief from casualties.

If a seller is due a casualty to his superior, a purchaser from him, in the absence of agreement to the contrary, is entitled to call on him to pay such casualty before accepting a conveyance from him;[6] and where a disponee, having a conveyance with a clause of relief from casualties, takes infeftment and is thereby impliedly entered with the superior, and is found liable for a casualty exigible on account of the death, before[7]

[1] *Mackenzie's Trs.*, 2 F. 1278; and comp. *Hunter*, 20 D. 60 (a case of special contract).

[2] 16 R. 545.

[3] 31 & 32 Vict., c. 101, ss. 5 and 8, and schedule (B); re-enacting 10 & 11 Vict., c. 48, s. 3, and 10 & 11 Vict., c. 49, s. 2.

[4] See p. 30.

[5] *Caledonian Insurance Co.*, 3 F. 865.

[6] *Gardiner*, M. 15,037; and see opinions in *Straiton Estate Co., Limited*, 8 R. 299.

[7] *Farquharson*, 2 F. 141.

or after 1874,[1] of the last expressly entered vassal before the date of his disposition, he is entitled to claim relief from his disponer.

Relief from burdens to be imposed.

In feu-rights and deeds of transmission clauses of relief from public burdens *imposed or to be imposed* on the lands are not infrequent. Such clauses, if unambiguous, are interpreted so as to give effect to the meaning and intention of the parties as expressed in the contract,[2] and, if ambiguous, may be construed by the actings of parties for a period of years.[3] Such clauses are held, as a rule, not to include burdens imposed by laws enacted after the date of the obligation, inasmuch as these are presumed not to have been in contemplation at the time of entering into the contract.[4] If a public burden falling under a clause of relief is reimposed by a statute under which the object and the incidence of the burden are the same as under the former law, the burden so reimposed is not considered a burden imposed by a supervenient law.[5] If, however, the incidence or the application of a burden is altered by a statute so as to make it a new burden, it will not be covered by the clause of relief.[6]

Burdens imposed by supervenient laws.

Relief from stipend and augmentations thereof.

Many of the cases relating to clauses of relief from burdens imposed or to be imposed relate to relief claimed from augmentation of stipend, which is a burden on the teinds. "In construing a clause of this nature it is of importance to observe if the teinds do or do not belong to the disponee. If the former, then it will require very clear expressions to relieve him from future augmentations of stipend; but if the latter, warrandice simply against teinds and stipends seems necessarily to imply relief from present and future stipends."[7]

Relief from burdens to be imposed not confined to lands; not affected by sub-feus; not limited to feu-duty.

The obligation to relieve of burdens imposed or to be imposed is not confined to the lands, but extends to all buildings erected thereon;[8] nor is it necessarily affected by the

[1] *Tough*, 7 F. 443; *Caledonian Insurance Co.*, 3 F. 865.

[2] See *Duff*, 11 R. 126.

[3] *Jopp's Trs.*, 15 R. 271.

[4] *Scott*, 12 D. 1077; and see *Caledonian Insurance Co.*, 3 F. 865.

[5] *Dunbar's Trs.*, 5 R. 350; aff. 5 R. (H.L.) 221; see also *Reid*, 5 D. 644; *Lees*, 20 D. 6; *Hunter*, 20 D. 1311; *Paterson's Trs.*, 2 M. 234; *Nisbet*, 7 M. 881; *Preston*, 8 M. 502; *Wilson*, 6 M. 483.

[6] *Dunbar's Trs.*, *supra*; *Stewart*, 3 R. 518.

[7] Duff, 89; and see cases in H.R. 227.

[8] See cases in H.R. 227, and add *Latto*, 5 F. 740.

vassal having sub-feued the lands to sub-vassals;[1] nor is it limited to the amount of the feu-duty, at least in cases where buildings or other improvements were in the contemplation of parties at the date of the grant.[2] It has also been settled that an obligation of relief granted by a superior is binding on his successors in the superiority, but not on his general representatives, when he has simply bound himself and his heirs and successors to implement it.[3]

Clause binds successors in superiority.

IX. Clause of warrandice.

IX. CLAUSE OF WARRANDICE.—The statutory form of this clause in a disposition is—"And I grant warrandice";[4] and it, unless specially qualified,[5] is "held to imply absolute warrandice as regards the lands, and writs, and evidents, and warrandice from fact and deed as regards the rents."[6] The clause in its statutory form is as applicable to an original feu as it is to a deed of transmission. If there is no clause of warrandice in a conveyance of heritage, absolute warrandice is implied if a full price has been paid; but where the deed, in which a clause of warrandice in its statutory form occurs, relates to heritage, then, whether it is onerous or gratuitous, the warrandice under it is absolute as regards the lands and writs, and evidents, and from fact and deed as regards the rent.[7] The obligation created by the clause against the granter is to indemnify the grantee in the event of the conveyance in his favour being reduced, or of the subjects being evicted from him in whole or in part,[8] on any ground not attributable to the grantee, and to warrant that the rents are due, but not that the debtors are solvent. Absolute warrandice, express or implied, does not, in the absence of agreement to the contrary, protect the grantee against losses or burdens caused by supervenient laws,[9] nor against losses and burdens natural to the right,[9] or arising from the nature or legal effects of ownership,[9]

Effect.

What absolute warrandice does not cover.

[1] See Lord Curriehill in *Dunbar's Trs.*, 5 R. 350, aff. 5 R. (H.L.) 221; *Montgomerie*, 3 D. 942; *Hunter*, 20 D. 1311; and *Latto*, 5 F. 740.

[2] *Stewart*, 22 D. 755; aff. 1 M. (H.L.) 25; *Dunbar's Trs.*, *supra*; *Latto*, 5 F. 740.

[3] *Stewart*, 6 M. 382; aff. 8 M. (H.L.) 1.

[4] 31 & 32 Vict., c. 101, s. 5, schedule (B), Nos. 1 and 2, re-enacting 10 & 11 Vict., c. 48, s. 3, and 10 & 11 Vict., c. 49, s. 2.

[5] See *N.B.R. Co.*, 20 R. 785.

[6] 31 & 32 Vict., c. 101, s. 8.

[7] Ersk. 2, 3, 25; Bell's Prin. 122; *Ramsay*, 8 S. 399; *Blair*, 14 S. 945; *Galloway*, 1 D. 74.

[8] See *Welsh*, 21 R. 769, and cases in H.R. 229.

[9] See cases in H.R. 229.

nor from servitudes, unless of a very burdensome or exceptional sort, although in practice the best course is to exempt servitudes from the warrandice.[1] Absolute warrandice under a deed dealing with heritage warrants peaceable possession of the subjects conveyed by the dispositive clause, and also warrants the assignation of writs for the purpose for which they are assigned — *i.e.* the purpose of maintaining the grantee in possession of what the dispositive clause conveys.[2]

What absolute warrandice covers.

When feu-rights granted by the disponer or his predecessors are excepted from a warrandice clause, the exception covers only feu-rights completed by infeftment;[3] and where a disponee, with a clause of warrandice in his favour, has sold his property to a stranger, such disponee has nevertheless a title to call on his disponer to disburden the property.[4]

X. Clause of registration.

X. Clause of Registration. — The statutory form of this clause in a disposition is—"And I consent to registration hereof for preservation,"[5] and it imports, unless specially qualified, "a consent to registration and a procuratory of registration in the books of Council and Session, or other judges' books competent, therein to remain for preservation."[6] This form is quite applicable to an original feu-right; but whereas a disposition or Crown charter can be recorded either in the books of Council and Session or other judges' books competent, a feu-charter by a subaltern superior can be recorded for preservation under the Statute 1693, c. 35, only in the books of Council and Session.[7] If a feu-charter, with a clause of consent to registration for preservation, is presented for registration in the Register of Sasines, with a warrant of registration specifying that the writ is to be registered for preservation as well as for publication, and is recorded therein, such registration is equivalent to registration also in the books of Council and Session for preservation.[8]

Effect of clause.

1 See cases in H.R. 229.

2 *Brownlie*, 5 R. 1076; aff. 7 R. (H.L.) 66; and see *Leith Heritages Co.*, 3 R. 789.

3 *Ceres School Board*, 23 R. 279.

4 *Christie*, 25 R. 824.

5 31 & 32 Vict., c. 101, s. 5, schedule (B), No. 1.

6 *Ibid.*, s. 138, re-enacting, with additions, 10 & 11 Vict., c. 48, s. 3, and 23 & 24 Vict., c. 143, s. 30.

7 Jur. Styles, i. 32; Bell's Lect. i. 645.

8 31 & 32 Vict., c. 64, s. 12, as amended by s. 141 of 31 & 32 Vict., c. 101, and s. 6 of 40 & 41 Vict., c. 40.

XI. Testing clause.

XI. Testing Clause.[1]

Completion of grantee's title.

When description sufficient.

INFEFTMENT.—If a feu-charter contains (*a*) a general description of the lands; or (*b*) a particular description of them; or (*c*) a description of them by statutory reference; or (*d*) a description of them by general name in terms of section 13 of the Titles to Land Consolidation Act, 1868, the grantee can complete his title either (1) by having the feu-charter recorded, with a warrant of registration in his favour, in the form of schedule (H), No. 1, of the Titles to Land Consolidation Act, 1868, in the division of the General Register of Sasines applicable to the lands therein contained;[2] or (2) by having expede and recorded, with a warrant of registration in the form of schedule (H), No. 1, in his favour, in the division of the General Register of Sasines applicable to the lands therein contained, a notarial instrument in the form of schedule (J) of the Titles to Land Consolidation Act, 1868.[3] If such feu-charter contains a clause of direction, and it is desired to put in the Register of Sasines only those parts directed by the deed to be recorded, the warrant of registration will be in the form of schedule (F), No. 2, of the Act of 1868;[4] and any notarial instrument following on such charter must contain the part or parts directed to be recorded.[4]

(1) By recording feu-charter with warrant of registration.

(2) By recording notarial instrument with warrant.

Where insufficient description.

If, on the other hand, the feu-charter contains a description of the lands (*e*) in general terms,[5] or (*f*) by reference not in statutory form[6] (neither of which descriptions, however, is to be met with in practice in feu-rights), the grantee cannot register the deed; but he, as a general disponee, can use the deed as a midcouple, and complete his title in this way: by having expede and recorded, with a warrant of registration in the form of schedule (H), No. 1, in his favour, in the division of the General Register of Sasines applicable to the lands therein contained, a notarial instrument in the form of schedule (L) of the Titles to Land Consolidation Act, 1868,[7] the charter being used as a midcouple. A warrant of registration, which contains the name and designation of the person on whose behalf the writ

(3) By recording notarial instrument with warrant

[1] See "Moveable Rights," p. 49.
[2] S. 15.
[3] S. 17.
[4] S. 12.
[5] See p. 35.
[6] See p. 35.
[7] S. 19.

is to be registered, and specifies the register (or registers) in which registration is to take place, may be signed either by the grantee or grantees, or by his or their agent or agents, and in the latter case either by an individual agent or by the subscription of any firm of which such agent may be a partner.[1]

Particular Register of Sasines.

The above methods of completing a grantee's title under a feu-charter have been in use since the commencement of the Titles to Land Consolidation Act, 1868. For some time after the commencement of that Act it was competent to record a feu-charter or other writ either in the Particular Register of Sasines applicable to the lands or in the General Register of Sasines; but the Land Registers Act, 1868,[2] ordained that the different particular registers of sasines should be discontinued not later than the 31st December 1871, and they accordingly came to an end at various dates before the end of 1871.[3]

Use of instrument of sasine.

A feu-right or a deed of transmission may still contain a precept of sasine either in the form in use before the Infeftment Act, 1845, or in the form introduced by that Act. If there is a precept in the deed, infeftment may be taken as above described, or an instrument of sasine may be expede and recorded. Whatever the form of the precept, the instrument of sasine may be in the form introduced by the Infeftment Act, 1845; but if an instrument of sasine in the form in use prior to 1845 is to be expede, the deed must have a precept in the form in use prior to that date, and the instrument must be preceded by symbolical delivery on the lands, and followed by registration.

Points to be observed in taking infeftment.

In connection with the taking of infeftment, these points require to be kept in view:—(1) All writings whatsoever which may be recorded in any Register of Sasines require, to enable them to be recorded, to have warrants of registration.[4] (2) Writings affecting land held burgage prior to the commencement of the Conveyancing Act, 1874, are recorded in the Burgh Register, and those affecting lands in Paisley held by

(1) Warrants of registration.

(2) Registers for subjects, burgage, booking, or feu.

[1] 31 & 32 Vict., c. 101, s. 141.
[2] 31 & 32 Vict., c. 64, s. 8.
[3] See H.R. 235.
[4] 37 & 38 Vict., c. 94, s. 33; and 31 & 32 Vict., c. 101, ss. 15, 141; and see *Johnston*, 3 M. 954.

booking tenure prior to that date are recorded in the Register of Booking at Paisley; whereas writings affecting lands not so held are recorded in the appropriate division of the General Register of Sasines.[1] (3) The General Register of Sasines has, since 31st December 1868, been kept, in accordance with the provisions of the Land Registers Act, 1868, as follows:—(*a*) The writs applicable to each county are entered in a separate series of presentment books, minuted in a separate series of minute-books, and engrossed in a separate series of register volumes in the order of presentment: (*b*) Where any writ contains land in more than one county, such writ is entered by the ingiver in the presentment book of each of the counties specified in the warrant of registration, minuted in the minute-book of each of these counties, and engrossed at length in the division of the register applicable only to one county,—a memorandum being entered in each division of the register applicable to the other counties specified in the warrant, setting forth the volume of the register, and the folio or folios of such volume in which such engrossment is made. Where the warrant of registration upon a writ referring to lands in more than one county does not apply to all the counties in which the lands are situated, the writ may nevertheless be effectually recorded, as regards the counties to which the warrant applies, in the minute-books and register volumes of these counties. The writ may be presented subsequently with a new warrant of registration in the register of any other county in which the lands to which it relates are situated, and will then be recorded in the minute-book and register volume of such county, a memorandum as above described being a sufficient entry in the register volume. Where any writ is transmitted by post for registration in the General Register of Sasines, the keeper causes it to be presented for registration by a clerk appointed by him for that purpose, who is held as the ingiver of the writ. Where two or more writs transmitted by post are received by the keeper at the same time, the entries in the presentment book and minute-book are of the same year, month, day, and hour, and the writs

(3) General Register of Sasines.

How kept.

Writs of each county kept separate.

Where writ contains lands in different counties.

Writs transmitted by post.

[1] 37 & 38 Vict., c. 94, s. 25.

are deemed to be presented and registered contemporaneously. No error or omission in any presentment book of the General Register of Sasines invalidates or in any way affects injuriously the registration of any writ recorded in the register. It is not necessary to register in the Books of Council and Session for preservation, or for preservation and execution, any writ competently registered in the General Register of Sasines; for where a writ bears a warrant of registration in the Register of Sasines, with an addition specifying that the writ is to be registered for preservation or for preservation and execution as well as for publication, then registration in the Register of Sasines has all the legal effects of registration in the Books of Council and Session for these purposes, and extracts of a writ so registered, with the warrants of execution thereon, have the same effect as extracts from the Books of Council and Session. But no writ can be held to be registered for the purpose of execution which does not contain a procuratory of registration, or clause of consent to registration for the purpose of execution.[1] Under the Registered Writs Execution Act, 1877,[2] where any writ containing a procuratory or clause of registration for preservation and execution has been registered in the General Register of Sasines upon a warrant for preservation, but not for execution, it is competent to present for registration in the register an extract of the writ, with a warrant of registration, bearing that the extract is to be registered for preservation and execution. It is not necessary to engross the extract *ad longum* in the register, an insertion of a memorandum of the extract in the appropriate division or divisions of the register being sufficient.[3] (4) In case of any error or defect in any instrument, or in the recording of any deed or conveyance, or in any warrant of registration recorded or to be recorded in any Register of Sasines, or in any warrant of registration thereon, or in the recording of such warrant, it is competent of new to make and record such instrument, or of new to record the deed or conveyance with the original or a new

When registration equivalent to registration in the Books of Council and Session.

What writs may be recorded in Register of Sasines for preservation and execution.

(4) Errors in instruments, etc.

[1] See 31 & 32 Vict., c. 64; and 31 & 32 Vict., c. 101, ss. 138, 141, 142; and 40 & 41 Vict., c. 40.

[2] 40 & 41 Vict., c. 40, s. 6.

[3] On provisions of 54 Vict., c. 9, regarding new boundaries, see H.R. 241.

warrant of registration, as the case may require.[1] (5) Unless it is averred and proved that erasures in instruments of sasine and other instruments have been made for the purpose of fraud, or the record thereof is not conformable to the instruments as presented for registration, such instruments are not challengeable on the ground that any part of them is written on an erasure ;[2] and no challenge of any deed, instrument, or writing recorded in any register of sasines can receive effect on the ground that any part of the record of such deed, instrument, or writing is written on erasure, unless such erasure be proved to have been made for the purpose of fraud, or the record is not conformable to the deed, instrument, or writing as presented for registration.[3] (6) Extracts of all conveyances or deeds, warrants of registration, and instruments recorded in the Register of Sasines make faith in all cases as the recorded conveyances or deeds, warrants, and instruments themselves would have done, except where any such conveyance or deed, warrant, or instrument so recorded shall be offered to be improven.[4]

(5) Erasures in instruments, etc.

(6) Extracts.

Blench-Charter.—The blench-charter is now seldom used. The only differences between it and the feu-charter are that the dispositive clause states that the lands are sold and "in blench" (instead of "in feu-farm") disponed, that the clause of *tenendas* states that the subjects are to be held of the granter in free blench farm, fee, and heritage for ever, and that the clause of *reddendo* stipulates for payment of an illusory duty, *e.g.* one penny Scots, if asked only.[5]

Blench-Charter.

Feu-Disposition.—Instead of the feu-charter, the form of the disposition with a holding *de me* was sometimes used to constitute a feudal legal fee. In form, however, the feu-charter and the feu-disposition are now the same.[6]

Feu-Disposition.

Feu-Contract.—Unlike the feu-charter, blench-charter, and feu-disposition, the feu-contract is a bilateral deed, and it is used when parties wish to be able to enforce by direct personal

Feu-Contract.

[1] 31 & 32 Vict., c. 101, s. 143.
[2] 6 & 7 Will. IV., c. 33; and 31 & 32 Vict., c. 101, s. 144.
[3] 37 & 38 Vict., c. 94, s. 54.
[4] 31 & 32 Vict., c. 101, s. 142.
[5] Jur. Styles, 5th ed., i. 34, and see p. 9 *supra*.
[6] *Ibid.*, i. 35.

diligence the obligations undertaken under it. It contains, as well as the ordinary clauses of a feu-charter, an express obligation by the vassal to pay and perform the several duties and obligations due to the superior, a clause of registration in which both parties consent to registration both for preservation and for execution,[1] in virtue of which summary diligence can be used to compel implement of the stipulated prestations contained in the contract against the original vassal.

Investiture *propriis manibus*.

INVESTITURE *PROPRIIS MANIBUS*. — Investitures *propriis manibus* are used now in practice only by husbands to give liferent rights to their wives. Where a disponee desires to infeft his wife in a liferent right he may record his conveyance in the Register of Sasines, with a warrant of registration[2] thereon signed by himself. Such recording has the same effect in all respects as if the conveyance had been followed by an instrument of sasine or of resignation and sasine *propriis manibus* expede in favour of the wife of the disponee, and signed by him and recorded at the date of recording the said conveyance or deed according to the law and practice theretofore in force. The warrant of registration on a conveyance presented for registration *propriis manibus* first directs registration in the register of the county or counties applicable to the lands, and then registration on behalf of the wife in these terms:—"And also *ex propriis manibus* on behalf of L., wife of the said A. B., in liferent." In respect that there is no warrant in favour of the wife other than that in the warrant of registration, the husband himself must in this case sign the warrant of registration.

[1] Jur. Styles, 5th ed., i. 35.

[2] 31 & 32 Vict., c. 101, schedule (H), No. 3, and see s. 15.

CHAPTER IV

CASUALTIES

No casualties under feus created after 1874.

It has already been explained that, in feus granted after the commencement of the Conveyancing Act, 1874,[1] no casualties[2] are by law, irrespective of express condition or agreement, payable to the granter of the feu, and that it is not lawful to stipulate for any casualty to be paid on the succession of an heir, or the acquisition by a singular successor, or in any way except at fixed intervals.[3] The Act, however, did not abolish casualties under feu-rights created before 1874.

Casualties of grant created before 1874.

The casualties of a grant of land held either by feu or by blench tenure prior to the Conveyancing Act, 1874, were—(1) relief; (2) composition; (3) non-entry; and (4) liferent escheat. Non-entry resolved itself into a way of forcing a disponee of land to enter as a vassal; and it was abolished by the Conveyancing Act, but an action of declarator and for payment of a casualty was introduced in place of the action of declarator of non-entry.[4]

Who are heirs of, and strangers to, last investiture.

When a vassal disponed the *dominium utile* of a feu prior to 1874, his disponee had sooner or later to obtain an entry from the superior. The superior entered the disponee only on payment of a casualty of composition. When the disponee paid this casualty he was entitled to get a destination in favour of himself and any series of substitutes, in the writ which the superior granted to him on accepting him as an entered vassal. This destination was termed an enfranchised investiture; the substitutes under it were termed the heirs of the enfranchised investiture, or the heirs of the last entered vassal; and other

[1] S. 23, and see p. 55, *supra*.
[2] Except liferent escheat; see p. 88, *infra*.
[3] For casualties under feu-rights contracted for prior to but not granted until after 1874, see s. 24, and pp. 55, 81.
[4] S. 4 (4).

persons obtaining right to the *dominium utile* were termed singular successors or strangers to the last enfranchised investiture.[1]

Relief and composition.

Relief was, before 1874, the sum payable to the superior by the heir of the last entered vassal on his entry; it is now the sum payable by the heir of investiture on the death of the last vassal who was either expressly entered before 1874 or who, being impliedly entered, has paid a casualty since 1874. It consists still of one year's feu-duty over and above the feu-duty due for the year in which it is exigible. Composition was, before 1874, the sum payable to the superior by a singular successor in lands on his entry; it is now the sum payable by a singular successor in the lands, on the death of the last vassal who was expressly entered, or who, being impliedly entered, had paid a casualty since 1874. It consists of a year's rent of the lands, with the rent of the buildings thereon,[2] or, if they are in the possession of the singular successor,[3] the sum for which they might be let, under deduction, in either case, of (1) the annual feu-duty;[4] (2) all public burdens[4] (including minister's stipend, unless a deduction is made, as after stated, in respect of teind); (3) all annual burdens imposed with the superior's consent;[4] (4) the cost of all reasonable repairs;[4] and (5) when the superior has no title to the teinds, one-fifth of the teindable or agricultural rental, whether the teinds are valued or not.[5]

Amount of composition.

The composition payable by a singular successor is, to use the words of the Act 1469, c. 36, "a zeire's" (*i.e.* a year's) "maill as the land is set for the time."

The Act has been construed to mean that, if the land is not let, the superior is entitled to the rent for which it might be let. The Court of Session, prior to and after 1874, showed a tendency, in fixing the year's rent for composition, to seek, in certain cases, an equitable modification of the words of the statute of 1469. Thus, for example, the Court fixed the composition due for salmon fishings, and lands let yearly in grass, at the average rent for the last seven years;[6] the com-

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1 See *Crawfurd*, 6 R. 708; *Scottish Amicable Society* (O.H.), 34 S.L.R. 676.

2 Act 1469, c. 36; *Anderson*, 3 S. 334, 2 Ross' L.C. 188.

3 *Lord Blantyre*, 20 D. 1188; *School Board of Neilston*, 15 R. 44; *M'Laren*, 13 R. 580.

4 *Aitchison*, M. 15,060, 2 Ross' L.C. 183; *Anderson, supra*. No deduction is allowed for fire insurance, income tax or property tax; see *Lindsay*, 25 R. 1155; *Magistrates of Inverness*, M. 9300, 2 Ross' L.C. 189.

5 *Thomson*, 4 S. 224; *Reid*, 2 Ross' L.C. 189; *Magistrates of Inverness, supra*; *Burt*, 5 R. 445; Bell's Lect. ii. 1148.

6 *Magistrates of Inverness, supra*.

Salmon fishings; grass lands; shootings.

position due in respect of lands sub-feued for a yearly duty and a grassum (or price) at the yearly feu-duty and a year's interest on the grassum;[1] and the composition for minerals which were being worked, at a percentage on a sum equal to ten years' purchase of the average mineral rents for three years preceding a certain date.[2] But the House of Lords, in the case of the Earl of Home,[3] condemned any modification of the words of the statute.[4] As the law stands, the rents of (*a*) salmon fishings, (*b*) grass lands, and (*c*) shootings,[5] if they are let, or the rents which might be obtained for them, if they are not let, have to be taken into account in fixing the measure of composition due to a superior.

Sub-feus.

Where lands have been sub-feued, the composition, in a question with the superior and his own vassal, is estimated thus: (1) if the sub-feu has been granted for a yearly feu-duty, the composition is that duty;[6] and (2) if it has been granted for a yearly feu-duty and a price, the composition is not the duty as well as a year's interest on the price, but the rent which the ground would bring if it were let.[7] It has also been decided that, (*a*) if a feu has been granted for a feu-duty increasing annually, the composition is the feu-duty due for the year in which the composition becomes exigible and is demanded, although that may not be the ultimate feu-duty;[8] (*b*) if it has been granted for a yearly feu-duty, on the expiry of a certain time during which the sub-vassal is not bound to pay any feu-duty, the composition is nevertheless the stipulated feu-duty, even although the time for payment has not arrived;[9] and (*c*) if a building stance has been temporarily cleared of buildings, the measure of composition is determined by the amount which might reasonably be obtained in name of sub-feu-duty for such stance,[10] but the measure of composition of a piece of ground which, although disponed for building purposes, has never been so used is determined by the purposes to which it is *de facto* devoted when a casualty becomes exigible.[11] It is not determined whether, in estimating composition, a superior has any interest in any casualty falling to his vassal from a sub-vassal in the year in which the composition is exigible.[12]

Consolidation.

Prior to 1874, the law was that, if a fee of superiority and a fee of property were consolidated, the measure of composition due to the superior was a year's rent of the consolidated fee; but the Conveyancing Act, 1874,[13] provides that no consolidation that may be effected hereafter shall in any way affect or extend the rights or interests of any over-superior, or entitle him to any more than the duties or casualties to which he would have been entitled had there been no consolidation. But where a person who acquires both the *dominium directum* and the *dominium utile* of a feu, does not consolidate them, and thereafter dispones the two fees to different persons, the disponee of the *dominium directum* can sue the disponee of the *dominium utile* for a casualty. The disponee of the superiority can do so whether the last expressly entered vassal died during the lifetime of the disponer of the superiority, or after his death. For in such circumstances the casualty is held not to be discharged by

1 *Campbell*, 10 S. 734.
2 *Sivright*, 6 R. 1208.
3 2 F. 1218, rev. 5 F. (H.L.) 13.
4 But see *Hill*, 5 R. 386 (a part of a railway); *M'Laren*, 13 R. 580 (a lunatic asylum); *Campbell*, 12 S.L.T. (O.H.) 160 (site of waterworks).
5 See *Stewart*, 8 R. 381.
6 *Ross*, June 6, 1815, F.C.; aff. 6 Pat. 640.
7 *City of Aberdeen Land Association*, 6 F. 1067, overruling *Campbell*, 10 S. 734.
8 *City of Aberdeen Land Association*, *supra*.
9 *Ibid.*
10 *Polloksbaws Co-operative Society, Limited*, 8 F. 638.
11 *School Board of Neilston*, 15 R. 44.
12 *Campbell*, *supra*.
13 S. 7.

implication or extinguished *confusione*.[1] Where a party acquires right to long leases and then purchases the lands, the long leases are extinguished *confusione*, and the composition due is not regulated by the rent in the leases but by the actual value of the lands.[2] Where, however, a vassal has let his lands and his lessee has sub-let them, the rent payable under the lease, not under the sub-lease, is taken as the measure of the casualty.[3] *Confusio.* Sub-lease.

The rent for minerals to be taken in calculating composition is determined thus: (1) where minerals are let out at a definite fixed rent, that rent is taken without regard to the probable exhaustion of the minerals;[4] (2) where a fixed rent and royalties are payable for minerals, the sums due for both rent and royalties in the year are taken, and the value of the royalties does not fall to be determined by a percentage on the capitalised value of the minerals;[5] but (3) where there are minerals in lands which, if worked, would yield a return, their value is not considered so long as they are not worked.[6] Minerals.

The rule for determining what are fixtures in estimating the amount of composition is as in a question between landlord and tenant, and accordingly trade fixtures are not considered part of the heritable subjects in the computation of a casualty.[7] Fixtures.

The rent which appears in the Valuation Roll is not conclusive in estimating the amount of composition due.[8] Valuation roll.

Prior to the Conveyancing Act, 1874, the year the free rent of which was taken as the amount of composition was the year of the actual entry of the vassal, or, when the vassal was unwilling to enter, the year in which the casualty was demanded.[9] But the implied entry introduced by that Act raised some difficulty.[10] The result of decisions in the Outer House seems to be: (1) that where a casualty is demanded from a vassal who was impliedly entered during the lifetime of the last vassal who had paid a casualty, the amount of the composition is determined by the rent current during the year of the latter's death;[11] (2) that where a casualty is demanded from a vassal who became impliedly entered after the death of the last vassal who paid a casualty, and where there are no implied entries interposed between the dates of these events, the amount is determined by the rent current during the year of the implied entry,[12] but where there are implied entries interposed, the amount is determined by the rent current during the year of What year's rent to be taken for composition.

1 *Motherwell*, 5 F. 619.
2 *Lord Blantyre*, 20 D. 1188.
3 *Campbell* (O.H.), 22 S.L.R. 292.
4 *Earl of Home*, 2 F. 1218, rev. 5 F. (H.L.) 13; *Sturrock*, 7 R. 799.
5 *Earl of Home*, *supra*, overruling *Allan's Trs.*, 5 R. 510, and *Sivright*, 6 R. 1208.
6 *M'Laren*, 13 R. 580.
7 *Marshall*, 13 R. 1042.
8 *Hill*, 5 R. 386; *Duke of Argyll*, 6 F. 949; and see *M'Laren*, *supra*.
9 Bell's Prin. 720.
10 See s. 4, subs. 3, and on implied entry p. 83, *infra*.
11 *Steuart* (O.H.), 19 S.L.R. 649.
12 *Steuart*, *supra*; *Steuart* (O.H.), 7 S.L.T. 253.

the last implied entry.[1] In no case can the measure of the casualty be the rent of a year prior to 1874.[2] But there is, it is thought, still room for the contention that the rent which ought to be taken for composition is now, as before 1874, the year when it is demanded.[3]

Taxed entry and conventional casualties.

It was quite competent, in feu-rights granted before 1874, to fix or "tax" the payment to be made either by heirs or by singular successors on their entry with the superior at a certain sum; or to contract, expressly or by clear implication,[4] that no casualties should be payable to the superior; or to contract for payment of casualties even at a time when the last expressly entered vassal was alive.

Before 1874 the *reddendo* often stipulated for payment on the entry of an heir of a year's feu-duty over and above the feu-duty of the year of entry; but this stipulation was unnecessary, for this payment was and is, under feu-rights created before 1874, due *ex lege* in name of relief. Instead of an heir on his entry paying relief, it was sometimes stipulated that he should pay a duplicand of the feu-duty in addition to the feu-duty of the year of entry.[5] Questions have arisen in construing such clauses as to whether their import was a payment equal to two years' feu-duty in all,[6] including the feu-duty, or two years' feu-duty over and above the feu-duty for the year in question.[7] Such questions depend for their answer on the precise terms used in the deed. In lieu of composition, it was a common practice to tax at a certain sum the amount payable on the entry of singular successors in the clause of *reddendo*, and then the entry was said to be *taxed*.[8] Clauses of taxation have as a rule received a strict interpretation, on the ground that they generally limit the superior's rights, and they have more than once raised the question whether their terms were broad enough to comprehend not only heirs but also singular successors. Thus, where there was a stipulation in the *reddendo* that the vassal's heirs and assignees should pay a double of the feu-duty the first year of their entry, it was interpreted as including assignees of the personal right before infeftment, but not purchasers from a grantee who had taken infeftment.[9] Similarly when feu-rights have provided for doubling the feu-duty on the entry of "each heir or assignee as use is of feu-farm,"[10] or for doubling the feu-duty at the entry of each heir or successor "as use is of feu-farm,"[11] or for paying a fixed sum "at the entry of each heir, and that as the composition to be paid for the entry of each vassal,"[12] singular successors have been held not to fall within the scope of the provision. Further, if by an original feu-right singular successors cannot found on a taxing clause, any writ by progress,

1 *Campbell*, 22 S.L.R. 292, but note *Straiton Estate Co.*, 8 R. 299; *Steuart*, 19 S.L.R. 649; and *Sivright*, 6 R. 1208.

2 *Houston*, 19 R. 524.

3 See *Motherwell*, 5 F. 619; *City of Aberdeen Land Association*, 6 F. 1067.

4 See p. 79, *infra*.

5 See *Earl of Zetland*, 3 D. 1124.

6 *Alexander's Trs.*, 5 F. 406.

7 *Earl of Zetland, supra*; *Cheyne*, 5 S.L.T. 27.

8 Bell's Prin, 726.

9 *Magistrates of Inverness*, M. 15,059, 2 Ross' L.C. 190.

10 *Salmon*, M. 4181.

11 *M'Lachlan*, 2 S. 303.

12 *Thomson* petitioner, May 22, 1810, F.C.

even a charter of novodamus, will *in dubio* be interpreted by reference to the original grant, because the presumption is against an innovation of the original grant, and it can only be overcome by showing that the superior and the vassal have transacted and agreed to make the innovation.[1] Thus, in the case of the *Magistrates of Inverkeithing*,[1] where the original feu-right fixed the payment for the entry of heirs and assignees at double the feu-duty, and the superior granted a charter of confirmation and novodamus which was in favour of the disponee and his heirs and assignees whomsoever (but excluding assignees before infeftment), and contained a stipulation for doubling the feu-duty at the entry of every heir or assignee to the lands, it was held (1) that the taxing clause in the original feu-right must be read as applicable only to assignees before infeftment, and (2) that the taxing clause in the charter of novodamus must receive the same construction, because it did not appear that the terms of the entry were intended to be altered. But if singular successors are expressly or impliedly included in a taxing clause, they will get the benefit of it.[2] To enable a vassal to found on a clause of taxation it must appear in the feu-right itself, not merely in a deed in implement of which the feu-right was granted.[3] It is not, however, lost by its omission from charters by progress,[4] and a superior, in respect of a clause in his own titles, may be obliged to give a vassal the benefit of a taxed composition.[5]

Discharge of casualties by implication.

It has been held that, where a feu-contract granted in 1866 contained a stipulation in the dispositive clause that a duplication of the feu-duty should be payable at the expiry of every twenty-five years, and the *reddendo* contained a stipulation for the annual feu-duty only, the duplication was to be deemed to be in full of all casualties.[6]

Stipulation for casualties payable during the lifetime of the last entered vassal.

So far, in this chapter, it has been assumed that a casualty, taxed or untaxed, is payable to a superior not sooner than the death of the last entered vassal, whether such vassal was expressly entered by a writ by progress before 1874, or, being impliedly entered after 1874, had paid a casualty in respect of his implied entry. But it was not uncommon, in feu-rights created before 1st October 1874, to stipulate for a casualty, taxed or untaxed, at each transmission of the property, irrespective of whether the last entered vassal was alive; and a casualty so stipulated for is sometimes called, for the sake of convenience, an artificial casualty, because a casualty at common law could not be demanded whilst an entered vassal was alive, or, to put the fact otherwise, whilst the fee was full. Whether such an artificial casualty can be enforced now—*i.e.* since 1874—depends on whether the feu-right contains machinery by which its payment can be enforced.

1 See Lord Deas in *Magistrates of Inverkeithing*, 2 R. 48, at p. 56.

2 *Innes*, 1 S. 518, N.E. 556; *Hamilton*, 15 D. 925; *Duke of Montrose*, 14 R. 378.

3 *M'Lachlan*, 2 S. 303.

4 *Stewart*, June 3, 1813, F.C.

5 See *Learmonth*, 16 D. 580.

6 *Magistrates of Dundee*, 11 R. 145.

The law, as it stands at the present time, is this:—(*a*) That if a feu-right, granted before 1874, stipulates for payment of a casualty (or for the taking of entry) at a time or on the occurrence of an event which may take place during the lifetime of the last entered vassal, but contains no prohibition against subinfeudation and no irritant clause, payment of the casualty cannot be enforced during the lifetime of the last entered vassal, because it does not contain the necessary machinery for the enforcement of the casualty;[1] but (*b*) that if a feu-right, granted before 1874, contains a clause against subinfeudation fenced by an irritant clause, and stipulates for payment of a casualty at a time or on the occurrence of an event which may take place during the lifetime of the last entered vassal, payment of the casualty can be enforced by a petitory action during the lifetime of the last entered vassal, because it is deemed, in virtue of the clause against subinfeudation and the irritant clause, to contain the necessary machinery for the enforcement of the casualty.[2]

Redemption of casualties.

All casualties, *except those which consist of a fixed amount stipulated and agreed to be paid in money or in fungibles at fixed periods*, may now be redeemed by the "*proprietor* of the feu" on the following terms[3]:—(*a*) Where exigible *only on the death of the vassal*, on payment to the superior of the amount of the highest casualty, estimated as at the date of redemption, with an addition of 50 per cent.; (*b*) where exigible *on each sale and transfer as well as on the death of the vassal*, on payment of two and a half times the amount of the casualty payable on such occasions, estimated as at the date of redemption; (*c*) where calculated on the footing *of an annual sum being paid for each year from the date of the last entry*, on payment of eighteen times the amount of such annual sum.

Before redemption, any casualty which has become due must be paid.[4] The term "a proprietor of the feu"[3] does not include a person having only a personal title to the lands.[5] A proprietor infeft, and so constructively entered with the superior, has a right to redeem under the section, although the last vassal who has paid a casualty is still alive.[6] A proprietor of part of a divided feu is entitled to redeem the casualties applicable to his part irrespective of the casualties applicable to the remainder of the feu.[7] A prohibition against subinfeudation, fenced with an irritant clause, does not entitle the superior to demand for the redemption of casualties more than the highest casualty plus 50 per cent. (*i.e.* the case falls within category (*a*), and not category (*b*)).[8]

1 *Hamilton*, 4 F. 494.

2 *Dick Lauder*, 17 R. 320; *Church of Scotland* v. *Watson*, and *Church of Scotland* v. *Grieve*, both 7 F. 395; and *Fife Coal Co.*, 1907, S.C. 494; and see *L.-P. Inglis* in *Heriot's Hospital*, 17 R. 937 at p. 942; *Christie's Trs.*, 7 F. 756.

3 37 & 38 Vict., c. 94, s. 15.

4 See *Pollokshaws Co-operative Society*, 8 F. 638.

5 *Edinburgh Roperie and Sailcloth Co.*, 4 R. 1032; aff. 6 R. (H.L.) 1; and see *Leslie's Trs.*, 35 S.L.R. 855.

6 *Morris*, 4 R. 515.

7 *Edinburgh Roperie Co.*, *supra*; but see *Leslie's Trs.*, 35 S.L.R. 855.

8 *Morris*, *supra*.

Discharge of redeemed casualties or commutation into annual sum.

On payment or tender of the redemption money, the *superior* is bound to discharge the casualties,[1] unless he elects to have the redemption money commuted into an annual sum.[2] The casualties are discharged by a deed in the form of schedule F of the Conveyancing Act, which is recorded in the appropriate register of sasines. To be effectual, the discharge requires the consent of the creditor in any heritable security affecting the superiority.[3] It is in the option of the *superior* to have the redemption money commuted into an annual sum equal to 4 per cent. on the capital, which is thereafter deemed to be an addition to the feu-duty. This is carried out by recording in the appropriate register of sasines a memorandum in the form of schedule G of the Act, setting forth the amount of the annual sum and signed by the parties or their agents.[4] The consent of the superior's heritable creditors is not required to the commutation of casualties.[5] Entails do not bar the redemption or commutation of casualties.[6] Mid-superiors have the same right of redeeming casualties payable by them as proprietors of the *dominium utile*.[7]

In feus created prior to the commencement of the Act of 1874, the right of redemption, apart from special agreement, is given to the vassal only, and the right of commutation to the superior. But where feu-rights stipulating for or inferring casualties have been contracted for prior to the passing of the Act, but have not been granted prior to the commencement of the Act, the right of commutation of casualties is given by the Act to both superiors and vassals.[8]

Non-entry.

Before 1874, it was a fundamental principle in our land rights that a superior was entitled to have a vassal entered in the feu. On the death of the last entered vassal, the lands were said to be in *non-entry*; and if the heir of the last entered vassal or a singular successor in the lands declined to enter *habili modo*, the superior was entitled to raise an action of declarator of non-entry to have it found that the lands were in non-entry, that the bygone non-entry duties (*i.e.* the bygone feu-duties, or, in blench holdings, the retour duties) since the last vassal's death until the date of citation belonged to him, and that the full rents, maills, and duties of the lands belonged to him as from the date of citation. Decree under this action empowered the superior to take possession of the lands to the exclusion of all others. His possession, however, was brought to an end by the heir or singular successor entitled to the lands coming forward and obtaining an entry.[9] Under section 4 (4) of the Act of 1874, no lands are now deemed to be in non-entry, and the action of declarator of non-entry has been superseded by an action concluding for (1) declarator that a casualty is

Action of declarator and for payment of a casualty.

1 37 & 38 Vict., c. 94, s. 16
2 *Ibid.* s. 17.
3 On s. 16 and schedule F. see Mowbray's Analysis, 18; Begg's Conveyancing Code, 346.
4 S. 17.
5 S. 17.
6 S. 18.
7 S. 19.
8 S. 24.
9 Bell's Prin. 705 and 707.

due and unpaid, and that the rents, etc., of the lands belong to the superior until payment thereof; and (2) decree for payment of the casualty, the summons being in the form of schedule B of the Act. An implied entry under the Act is no defence to this action. Decree under it has the effect of a decree of declarator of non-entry under the previously existing law, and the superior enjoys the same benefits as under such a decree, until payment of the casualty. The summons concludes for declarator that the superior is entitled to the rents, etc., as from the date of citation; but, as in the action of declarator of non-entry in use before 1874, any reasonable ground of delay in purging a casualty will entitle the Court to refuse to give the superior the rents, etc., from so early a date.[1] Non-entry duties are no longer exigible.[2]

Title to raise such action.

Before 1874, a superior raising the action of declarator had to be infeft in the lands themselves[3] or in the superiority of them,[4] and since 1874 a superior has not a title to sue the statutory action unless he is so infeft. Under the law prior to 1874, a liferenter by constitution,[5] unless special power was conferred on him by the fiar,[6] had no power to grant an entry, but a liferenter by reservation had such power;[7] and a liferenter by constitution, with power to grant entry to vassals, as well as a liferenter by reservation, will now, it is thought, have right to casualties under feus created prior to 1874, and a title to sue an action of declarator and for payment of a casualty. Where the defender in an action of declarator and for payment of a casualty maintained that there was no evidence establishing the identity of the lands held by him with the lands of which the pursuer held the superiority, and that his lands were held of another superior, and where his authors had taken entries with a superior of whom the pursuer was the representative, the Court held that, as the defender had failed to prove that the superiority of his lands belonged to any other person than the representative of the superior with whom the previous entries had been made, he was liable in the casualty.[8]

Exclusion of action.

Before 1874, non-entry was excluded by the existence of an entered vassal, although he had been divested by a conveyance and base infeftment thereon,[9] and now the action of declarator and for payment of a casualty is barred during the lifetime of any vassal who has entered under the law as it stood prior to 1874, or who has paid a casualty to the superior since 1874.

[1] *Preston*, Hume's Decisions, 770; *Chalmers*, 1 Pat. App. 404; *Robin*, 2 S. 404; *Hill*, 12 S. 411; *Marshall*, 14 S. 30; *Tod's Trs.*, 8 M. 264; *Ferrier's Trs.*, 4 R. 738.

[2] *Lord Advocate*, 17 R. 945.

[3] *Park*, May 16, 1816, F.C.; Ersk. 2, 5, 41.

[4] *Gardner*, 3 D. 534; and see *Hamilton*, Feb. 23, 1819, F.C.; *Mackenzie*, 7 M. 676.

[5] *Henderson*, 14 S. 540.

[6] *Gibson Craig*, 16 S. 1332, aff. 2 Rob. 446.

[7] Bell's Prin. 1040, 1048, 1055.

[8] *Macdougall*, 8 R. 42, aff. 8 R. (H.L.) 92; and see *Innes*, 7 D. 141; *Maconochie*, 14 D. 813.

[9] Ersk. 2, 5, 44.

Further, non-entry was excluded before 1874, even after the death of the last entered vassal in certain cases. Thus it was excluded (*a*) if there was a liferenter in possession under a grant from the superior ;[1] (*b*) if a widower was in possession of his deceased wife's lands in virtue of his courtesy ;[2] and (*c*) to the extent of a third, if a widow was in possession of her deceased husband's lands in virtue of her terce ;[3] and the action of declarator and for payment of a casualty follows the same rules.[4] The action of declarator and for payment of a casualty can be used only when the last entered vassal is dead.[5]

As the authorities stand, it is thought that it is still an open question whether a superior can raise a poinding of the ground for an untaxed composition or not ;[2] but for the recovery of the casualty of relief as well as for a taxed composition he can use a poinding of the ground.[2]

(1) Proprietor infeft cannot tender heir for entry.

Since 1874 it has been settled that—(1) Where a proprietor of lands is infeft on an *a me vel de me* holding, express or implied, the effect of the implied entry under the provisions of section 4 of the Conveyancing Act, 1874, is to extinguish the mid-superiority previously existing, to preclude him, in answer to the superior's demand for composition, from putting forward the heir of the last expressly entered vassal and paying relief duty, and to make him liable in the payment of a composition, whether the infeftment in respect of which entry was implied was prior or subsequent to the commencement of the Act.[6] Prior to 1874, a proprietor of land in such circumstances could have tendered for an entry the heir of the last entered vassal, if he was willing to enter and pay relief duty, and could thereby save himself from the payment of composition.[7] The Act has therefore, notwithstanding its terms, increased the superior's rights to casualties.

(2) Proprietor not infeft can tender heir for an entry.

(2) So long as the title of a proprietor of lands remains personal, and there is no implied entry between the last entered vassal and himself, he can still tender the heir of the last expressly entered vassal to the superior, and the superior cannot refuse to accept him as vassal on payment of relief duty.[8]

(3) Payment of casualty is for entry of proprietor in possession.

(3) Where different proprietors in succession have been infeft, and therefore impliedly entered, in the same lands, and the superior has demanded no common law casualty from

1 Bell's Lect. i. 623; and see *Stuart*, 17 R. 85.

2 Bell's Prin. 710.

3 *Ibid.*; Bell's Lect. i. 623.

4 See p. 82, *supra*.

5 *Trades Maiden Hospital*, 1906, S.C. 73.

6 *Rossmore's Trs.*, 5 R. 201; *Ferrier's Trs.*, 4 R. 738; *Stuart*, 16 R. 1030; and *Lamont*, 6 R. 739, aff. 7 R. (H.L.) 10.

7 *Hill*, 2 S. 681; *Piggott*, 8 S. 213; Bell's Prin. 712; Bell's Lect. ii. 1144; and see *Magistrates of Musselburgh*, M. 15,038; *Hyslop*, 1 M. 535.

8 *Duke of Hamilton*, 10 R. 1117; *Hope* 10 R. 1122.

them after the death of the last expressly entered vassal, a casualty paid by the proprietor in possession is held to be in respect of his own entry, and the superior has no claim against any intermediate vassal in respect of his implied entry, and is not entitled to exact any further casualty until the death of the proprietor who has paid the casualty.[1] The superior and the vassal do not stand in the relation of creditor and debtor; the superior's rights are, apart from contract, limited to enforcing payment indirectly by means of the statutory action from the vassal impliedly entered in the feu-right when the action is raised.[2] But when artificial[3] casualties are stipulated for, the superior may be in a position to enforce payment of more than one casualty.[4] (4) When the heir of the last expressly entered vassal, or of the last vassal in respect of whose entry a casualty has been paid, acquires the lands by *mortis causa* disposition from his ancestor and takes infeftment thereon, and is therefore impliedly entered with the superior, the superior is entitled only to relief duty from him.[5] But where the heir of the last entered vassal acquired the land by *mortis causa* disposition from an intermediate proprietor, who, while heir-presumptive of such vassal, acquired the land from him by disposition with alternate manner of holding, and took infeftment, but did not enter with the superior, and who was impliedly entered with the superior by the operation of the Act of 1874, such heir was held liable to pay composition in respect that a new investiture came into existence with the implied entry of the intermediate proprietor, which required to be enfranchised, and which could only be enfranchised by payment of a composition, although the heir was heir both of the last entered vassal and of the intermediate proprietor, who was himself the heir of the last entered vassal at the date of such vassal's death.[6] (5) Where testamentary trustees are infeft under the testamentary writings of the last expressly entered vassal, and do not hold for the heir of the truster, they are

(4) Heir of last investiture, acquiring by *mortis causa* deed, liable in relief.

(5) Testamentary trustees not holding for heir pay composition.

[1] *Mounsey*, 12 R. 236.

[2] *Motherwell*, 5 F. 619; *Heriot's Trust*, 6 F. 442; *Fisher's Ex.*, 6 F. 196.

[3] See p. 79.

[4] *Fife Coal Co.*, 1907, S.C. 494.

[5] *Mackintosh*, 13 R. 692; *Hope*, 10 R. 1122; and see *Mackenzie*, M. 15,053, M. App. *voce* Superior and Vassal, No. 2, 2 Ross' L.C. 398; *Magistrates of Musselburgh*, M. 15,038; *Marquess of Hastings*, 21 D. 871.

[6] *Stuart*, 16 R. 1030.

liable in composition to the superior.[1] Where testamentary trustees hold for the heir of the truster, their liability for casualties is limited by section 1 of the Conveyancing Acts (1874 and 1879) Amendment Act, 1887,[2] which provides that if trustees hold an estate under a *mortis causa* writing which directs them to convey it to the heir of the testator at some time within twenty-five years, or which gives the ultimate beneficial interest to the heir, then they are not liable for any casualty other than the heir would have had to pay had he taken the estate direct. If they pay such a casualty, then the heir on his entry is not liable for any further payment; but on his death another casualty becomes due, whether he became entered or not.

Testamentary trustees holding for heir only liable in relief.

Prior to the Act of 1887 it was decided that where testamentary trustees held for the heir, and a casualty was demanded from them, they were liable for composition.[3] But it has been decided that where testamentary trustees held, or came, on the occurrence of a certain event, to hold exclusively for the heir of the truster, and conveyed to the heir-at-law prior to any demand having been made against them for a casualty, then, although they had conferred on them a power of sale which it was not necessary to exercise, and although they were impliedly entered with the superior, the heir was not liable for composition, but only for relief duty.[4] Where trustees hold under directions whereby the heir of the last entered vassal has not necessarily the ultimate beneficial interest to the estate, although he may come to have that interest, the right of the superior to a composition is not excluded by the Act.[5] The section does not apply where the heir succeeds on the failure of other heirs or as a conditional institute, but only where the heir has the substantial right to the estate at the time when entry is demanded, subject, it may be, to usufructuary rights.[6] An opinion has been expressed that the Act does not apply to a trust disposition executed *inter vivos*, although it contained purposes which could only come into effect after the truster's death.[7] It does not apply to transactions completed under the law in force before 1874.[8]

(6) The infeftment of trustees under an *inter vivos* trust-disposition for payment of debts, containing a power of sale, and an obligation on the trustees to reconvey after the trust

(6) When trust a mere burden on fee.

[1] *Lamont*, 6 R. 739.

[2] 50 & 51 Vict., c. 69. See *Stuart*, 17 R. 85.

[3] *Lamont, supra*; and see Lord Rutherfurd Clark in *Duke of Athole* v. *Stewart, infra*; and *Grindlay*, Jan. 18, 1810, F.C.

[4] *Duke of Athole* v. *Menzies*, 17 R. 733; and see *Duke of Athole* v. *Stewart*, 17 R. 724; *Stuart, supra*; *Duke of Buccleuch*, 18 R. 587, aff. 19 R. (H.L.) 39; *Crawfurd*, 6 R. 708.

[5] *Magistrates of Edinburgh*, 4 F. 937; *Moir's Trs.*, 6 F. 219.

[6] Lord M'Laren in *Magistrates of Edinburgh, supra*.

[7] Lord Kincairney in *ibid.* and *Edinburgh Magistrates*, O.H., 9 S.L.T. 318; and see *Edinburgh Magistrates*, O.H., 9 S.L.T. 197.

[8] *Sutherland*, 5 F. 90.

purposes are satisfied, does not divest the granter of the feudal fee, nor entitle the superior to a casualty ;[1] and when a trust created by a *mortis causa* deed under which trustees are infeft is purely temporary in its nature, and the right in the trustees so infeft is a mere burden on the fee, the trust right is no impediment to the heir entering on payment of relief duty.[2]

Casualties under entails, etc. before 1874.

In considering what casualties are now due to a superior under feus created prior to 1874, it is well to keep in mind that it was decided before that year—

(1) Institute, if heir, entitled to entry for relief.

(1) that where an institute of an entail was the heir of the existing investiture, the superior was bound to enter him on payment of relief duty, reserving, if he desired, in the writ by progress granted to the heir, his right to a composition on the entry of the first stranger substitute ;[3]

(2) Institute paying composition.

(2) that where the institute in a deed of entail was not the heir of the existing investiture, but a stranger to it, he was bound to pay a composition on his entry ; but that when an institute or heir under an entail, whether an heir of the investiture or a stranger, paid a composition, the payment enfranchised all the substitute heirs, and enabled them to enter on payment of relief duty, although there was a stipulation in the writ by progress granted to the party paying the composition to the effect that on the entry of stranger substitutes the superior should be entitled to exact composition ;[4]

(3) Case of trustees executing a deed of entail.

(3) that where a vassal base infeft directed her testamentary trustees to entail her lands on her nephew and a certain series of heirs, and when the heir-at-law (who was her nephew) completed a title to the lands and paid composition, and then conveyed them to her trustees, who thereupon executed a deed of entail in terms of her directions, the superior was not entitled to payment of a second composition on the entry of the institute under the entail ;[5]

(4) If composition paid, superior bound to grant writ with destination.

(4) that if a vassal, or purchaser, or assignee of a personal title to land paid a composition, the superior was bound to grant a charter or other writ by progress containing a destination in favour of whatever persons the vassal, purchaser, or assignee might name, and that the persons named in the charter or other writ, although strangers to the person making the payment, or to each other, were entitled in the character of heirs of the investiture to entry on payment of relief duty ;[6]

(5) Effect same whether destination in fee-simple deed or entail.

and (5) that the principles stated above in (1) and (2) were applicable to institutes and substitutes, not only in entails, but also in other deeds[7] with a destination. From these cases it would seem to follow that if an institute under a deed in fee-simple or of entail pays composition to a superior after 1874, the superior will not be entitled to exact more than relief duty from a substitute under the deed ; but that an institute under such a deed, if he is the heir of the last investiture, is not bound to pay more than relief duty, and can leave the superior to exact composition from the first substitute who is a stranger to the last investiture.

[1] *Marquis of Huntly*, 14 R. 1091.

[2] *Lord Home*, 15 R. 1 3.

[3] Bell's Lect. ii. 1142; *Mackenzie*, M. 15,053, M. App. Superior and Vassal, No. 2, 2 Ross' L.C. 398 ; *Marquess of Hastings*, 21 D. 871. See *Duke of Argyle*, M. 15,068. 2 Ross' L.C. 335.

[4] Ersk. 2, 7, 7 ; Bell's Lect. ii. 1142 ; *Stirling*, 4 D. 684, aff. 3 Bell's App. 128, 2 Ross' L.C. 340 ; *Heriot's Hospital*, 12 R. 30.

[5] *Advocate-General*, 17 D. 21 ; and see *Duke of Sutherland*. O.H., 11 S.L.T. 372.

[6] *Lockhart*, M. 15,047, 2 Ross' L.C. 329 ; *Stirling, supra ; Duke of Hamilton*, 6 S. 94 ; *Duke of Hamilton*, 1 D. 689.

[7] *Stirling, supra* ; and see *Heriot's Hospital*, 12 R. 30 ; and *Duke of Hamilton*, 1 D. 689.

Liability of corporations and trustees for casualties.

Prior to 1874 a superior was not bound without express stipulation to enter corporations. If he did enter them, he lost right to casualties in all future time, because a corporation never dies.[1] Similarly, prior to 1874, a superior was not bound, without express stipulation, to enter trustees;[2] but if he did enter them, he could not exact another casualty until the death of the last survivor of them, unless he made provision, on granting entry, for payment of casualties. As a superior cannot now prevent either a corporation or trustees from taking entry, section 5 of the Conveyancing Act, 1874, provides for the casualties to be now paid by them under feu-rights created before the commencement of the Act. Under this section a corporation pays a composition at the date when it would have been payable independently of the Act and every twenty-fifth year thereafter. Similarly, when a composition payable on the death of the vassal becomes exigible from a trustee or body of trustees, another composition is payable at the end of every twenty-five years. If, however, the composition is payable in terms of the feu-rights on the occasion of each sale or transfer of the property as well as on the death of the vassal, and accordingly a composition is exigible from a corporation or trustee or body of trustees on the acquisition of the property, another composition is payable every fifteen years thereafter. If the corporation or trustees or trustee ceases to be proprietor of the land after having paid a composition in terms of the section, then another composition is paid by the successor at the end of twenty-five years where a composition is payable at the death of the vassal, and at the end of fifteen years where it is payable also on each sale and transfer, from the date of the last payment as aforesaid, and thereafter the casualties are paid as if no corporation or trustees had ever been vested in the lands.

Payment of casualty by corporations or trustees.

It has been held that where a composition is "payable on the death of a vassal," it only becomes payable within the meaning of the section when demanded, and that a second composition only became due twenty-five years after the

[1] See *Burns*, O.H., 13 S.L.T. 560; *Hill*, Jan. 17, 1815, F.C.; *Heriot's Trust*, 17 R. 937; *Earl of Lauderdale*, 24 R. 914; *Learmonth*, 16 D. 580; *Campbell*, 5 D. 1273; and Bell's Lect. ii. 1146.

[2] Bell's Lect. 1142–6. See 37 & 38 Vict. c. 94; Begg's Conveyancing Code, 325.

demand for payment of the first, and not twenty-five years after the implied entry.[1] So where a taxed composition is payable on the occasion of each sale and transfer of the property as well as on death of each vassal, a second composition is payable fifteen years after the first payment, and not fifteen years from the date of acquisition where the superior had delayed to make his demand for several years.[2]

By persons having separate interests, when composition taxed, etc.

Where a taxed composition is payable on the occasion of each sale or transfer of the property as well as on the death of each vassal, and where two or more parties having separate interests as liferenter and fiar respectively or as successive liferenters are impliedly entered, a composition, or in the case of parties interested *pro indiviso* a rateable share of a composition, is exigible from each of the parties taking benefit under the implied entry in the order in which they take such benefit.[3]

Pro indiviso proprietors.

Where lands are held by *pro indiviso* proprietors who are expressly entered with the superior, the superior is entitled at common law, on the death of one, to claim the casualty applicable to his interest in the lands.[4]

Is composition a casualty?

Composition is usually spoken of as a casualty; and it is treated as a casualty in the Conveyancing Act, 1874,[5] and is held to be included in an obligation to relieve of casualties.[6] On the ground, however, that composition is entirely the creation of statute, it has sometimes been asserted that it is not a proper casualty, but a personal claim, as to which the superior may require to be satisfied before he complies with the demand of a singular successor for an entry.[7] The expression "casualties of superiority" occurring in a feu-disposition will or will not include composition according as writers, etc., of the date of the disposition regarded composition as a casualty or not.[8]

Casualty of liferent escheat.

The casualty of liferent escheat is not of much practical importance. In virtue of it the superior has right to possession of his vassal's feu as long as the vassal lives and continues in rebellion. This casualty arises by denunciation of the vassal for a criminal cause unrelaxed for a year and day, or by his receiving sentence of death and escaping. But the possession taken by the superior in respect of the casualty is merely a usufruct, and is burdened with such of the vassal's debts as have been made real on the lands. The fee remains with the vassal, and may be disposed of by him in any way which does not prejudice the liferent right of the superior.[9]

[1] *Governors of Heriot's Trust*, 6 F. 442; *Trades Maiden Hospital*, 1905, S.C. 73.
[2] *Tough*, 7 F. 443.
[3] S. 5.
[4] *Governors of Cauvin's Hospital*, 1 M. 1164.
[5] S. 3 (7).
[6] *Edinburgh Gas Light Co.*, 5 D. 1325; *Straiton Estate Co.*, 8 R. 299; *Farquharson*, 2 F. 141; *Caledonian Insurance Co.*, 3 F. 865.
[7] See Lord Ormidale in *Morrison's Trs.*, 5 R. 800, and authorities cited there.
[8] *Stuart*, 17 R. 85; *Hill's Trs.* 4 F. 572.
[9] See Ersk. 2, 8, 66; Bell's Prin. 733, 734.

CHAPTER V

THE CONSTITUTION AND THE CONSTRUCTION OF AGREEMENTS FOR SALE OF HERITAGE; MISSIVES OF SALE; MINUTE OF SALE; ARTICLES OF ROUP; PRESCRIPTIVE PROGRESS OF TITLES; SEARCHES; BURDENS NOT DISCLOSED BY SEARCH; AGREEMENTS TO TAKE TITLE AS IT STANDS.

Sales of land require writing.

I. THE CONSTITUTION AND THE CONSTRUCTION OF AGREEMENTS FOR SALE OF HERITAGE.—An agreement to sell land is binding on neither the seller nor the purchaser until it is reduced to writing. The writing or writings must be either tested or holograph, or adopted as holograph by both parties or their authorised agents, and must show *consensus in idem*.[1] If one of two parties to a sale of heritage has given a writing either probative or holograph, and the other has given a writing neither probative nor holograph, either of the two may, in the absence of *rei interventus*,[2] resile from the contract;[3] because the rule is that neither party to a contract is bound unless both are bound. There, however, may be a unilateral obligation, holograph or tested, to convey heritage.[4] Further, if an informal written agreement or an oral agreement to sell land has been concluded and followed by *rei interventus*, as by payment of the price or part of it, *locus pœnitentiæ* is excluded; but whilst in this case the agreement can be proved only by writ or oath of party, the acts constituting *rei interventus* can be proved *prout de jure*.[5] When a disposition in implement of a sale of heritage has been accepted by the purchaser, it becomes the sole measure of his

Rei interventus.

[1] For cases, see H.R. 246.
For *rei interventus*, see Bell's Prin. ss. 25–6, and H.R. 247.

[2] *Malcolm*, 19 R. 278; *Fulton*, M. 8446; *Barron*, M. 8463. As to settlement of action relating to heritage, see *Anderson*, 4 F. 68.

[3] See *Malcolm*, *supra*.

[4] *Gowan's Trs.*, 24 D. 1382; *Allan*, 2 R. 587; *Walker*, 1863, 1 M. 417; and see *Hamilton*, 1 F. 478.

rights, and supersedes all previous communings and even contracts, however formal,[1] if such contracts are not validly made part of the disposition;[2] but where, under a sale of both heritage and moveables (*e.g.* the fittings of the heritage), the purchaser accepts a disposition of the heritage, he can, nevertheless, insist on the moveables being made over to him.[3] Where a proprietor of heritage has contracted to sell it to one person, and thereafter dispones it to another, the first purchaser is entitled to reduce the second purchaser's title on showing that the second purchaser had such knowledge of the first sale as ought to have put him on his inquiry, even although, on the face of the records, the second purchaser's title is unexceptionable.[4]

Agreements to sell land are usually embodied in one of these forms—Missives of Sale, Minutes of Sale, or Articles of Roup and relative Minutes.

Missives of sale. Essentials.

II. MISSIVES OF SALE.—Missives of sale consist of an offer to sell and an acceptance thereof.[5] They require to show *consensus in idem* as to the subjects sold, and to state the price or to provide means for ascertaining the price, as, for example, by arbitration.[6]

Time for accepting offer.

An offer, which is raised into an obligation only by acceptance,[7] can, if no period for acceptance is specified, be accepted either till it is withdrawn, or at least within a reasonable time;[8] or, if a period is specified, then during that period[9]—at least unless it is withdrawn sooner.[10] If an acceptance of an offer is posted before a letter of withdrawal of such offer is received, the contract is complete,[11] even although the acceptance should be delayed in transit.[12]

Minute of sale—when used.

III. MINUTES OF SALE.—When a disposition cannot be granted at the date of sale, or the state of the seller's title

[1] See Lord Watson in *Orr*, 20 R. (H.L.) 27, at p. 29; *Lee*, 10 R. 230, alt. 10 R. (H.L.) 91; *Croall*, 9 M. 323. And see also *Inglis*, 5 R. 58, aff. 5 R. (H.L.) 87 (a mercantile contract).

[2] See *Duke of Fife*, 3 F. (H.L.) 2.

[3] *Jamieson*, 3 F. 176.

[4] *Petrie*, 2 R. 214; *Stodart*, 4 R. 236.

[5] Jur. Styles (5th ed.), i. 73.

[6] *Earl of Selkirk*, M. 627; and *Earl of Aberdeen*, 2 S. 527; Bell's Prin. 92.

[7] Bell's Prin. s. 9.

[8] *Thomson*, 18 D. 1; and see *Hall Maxwell*, O.H., 9 S.L.T. 222.

[9] *Stein*, 4 Pat. 131.

[10] See *Heys*, 17 R. 381.

[11] *Thomson, supra*; *Household Fire Insurance Co.*, L.R. 4 Ex. D. 216.

[12] *Dunlop*, 6 Bell's App. 195.

is doubtful, or, it may be, when the conditions of sale are numerous, a minute of sale is preferable to missives of sale.

The contents of an ordinary minute of sale[1] are that the vendor agrees to sell and the purchaser to buy certain subjects, which are described particularly, or by reference, on the following or similar terms:—(1) that the price is a certain sum: (2) that on payment of the price the seller shall deliver to the purchaser—(*a*) a disposition, with all usual clauses; (*b*) a valid title to the subjects; (*c*) searches, real and personal, for the respective prescriptive periods: (3) that the seller shall clear the subjects of incumbrances: (4) that the purchaser is to have right to rents, and to be liable for feu-duties, etc., after the date of entry; and (5) that any question of dispute is to be settled by a person named as referee.[2] In adjusting a disposition to follow on a minute of sale, the terms of the agreement fall to be embodied, together with all the usual clauses proper to a disponee.[3] Contents of Minute.

IV. Articles of Roup.—When lands are sold by public roup, the conditions of the sale are contained in articles of roup. After describing the subjects to be exposed for sale, either particularly or by reference in statutory form, and mentioning the date and place of sale, the articles usually set forth—(1) the upset price; (2) the excess of an offer above a preceding offer; (3) term of entry; (4) a provision about deposit of the price, in whole or in part; (5) a provision that, on failure to deposit the price as stipulated for, the sale may be declared forfeited; (6) a provision that on payment of the price searches and a disposition of subjects are to be delivered; (7) a provision that titles are to be delivered or made furthcoming to the extent of a legal progress; (8) a provision that offerers have satisfied themselves as to the rental; (9) the way in which the expense of the transfer is to be borne; (10) a reference to arbiters named; (11) the nomination of the judge of the roup; (12) the penalty to be paid by the party failing to perform to the party willing to do so; and (13) the testing clause.[4] Articles of Roup. Contents of Articles.

[1] On Minutes of Sale, see Bell's Lect. ii. 698.

[2] Jur. Styles (5th ed.), i. 75; (6th ed.) i. 48.

[3] Lord Kinloch in *Corbett*, 10 M. 329, at p. 335.

[4] Jur. Styles (5th ed.), i. 77; (6th ed.) i. 50; and see H.R. 250 on articles of roup and sales of heritage by public roup.

Prescriptive progress of titles.

V. Prescriptive Progress of Titles.—In the absence of stipulation to the contrary, the seller of heritage is bound to give within a reasonable time from the date of the sale to the purchaser an unexceptionable progress of titles to the lands and a search, in addition to clearing the lands of incumbrances.

Requirements of Act 1617, c. 12.

Prescriptive progress before 1874.

The Act 1617, c. 12, which prior to the Conveyancing Act, 1874, contained the law on positive prescription, required for a prescriptive title in land rights forty years' possession, actual or civil, complete and continuous, without lawful interruption, in virtue of an infeftment. In other words, the prescriptive title which, before 1874, had to be produced by a seller of land consisted of—(1) an *ex facie* valid infeftment in the lands dated forty years prior to the date of the disposition to the buyer; (2) titles connecting the seller with such infeftment; (3) the warrant of such infeftment—*e.g.*, feu-charter, disposition, etc., if the progress started from the infeftment of a singular successor; but if the prescriptive progress started from the *ex facie* valid infeftment of an heir, the seller did not require to produce the warrant of the heir's infeftment—*e.g.*, precept of *clare constat*, etc., although it was extant. (4) There had to be in virtue of such infeftment forty years' possession, actual or civil, continuous and complete in degree, and without lawful interruption, exclusive of the years of minority of any proprietor.[1]

Prescriptive progress after 1874.

By section 34 of the Conveyancing Act, 1874, which alters the old law of prescription, it is provided—(1) that any *ex facie* valid irredeemable title to an estate in land, recorded in the appropriate Register of Sasines, is sufficient foundation for prescription; (2) that possession following on such recorded title for the space of twenty years continually and together, peaceably and without lawful interruption, is, for the purposes of the statute 1617, c. 12, equivalent to possession for forty years by virtue of heritable infeftments, for which charters and instruments of sasine or other sufficient titles required to be produced, according to the provisions of that statute; and (3) that if such possession has continued for thirty years, no deduction is to be made for minority or legal dis-

[1] See H.R. 258 for cases.

ability. The Act of 1874, it is thought, has not altered the old rule, that if a prescriptive progress starts from the infeftment of a singular successor, the seller has to produce the warrant of such infeftment.[1] The Act of 1874 expressly reserves the old law relating to the acquisition of any servitude or of any public right of way or other public right, to acquire which forty years' possession is still necessary.

"Charter" in sense of 1617, c. 12.

Although the Act of 1617, c. 12, speaks of the production of a "charter," this requirement is met by the production of an *ex facie* valid title, whether it be a charter properly so called or not.[2] Thus it is sufficient to produce a charter, disposition, separate procuratory of resignation, or precept of sasine, or sasine *propriis manibus*, which required no precept of sasine. A decree of adjudication not being an *ex facie* valid irredeemable title, there must now, as before 1874, be, in absence of a decree of declarator of expiry of the legal, forty years' possession from the date of the expiry of the legal, in virtue of the infeftment taken on the decree of adjudication, to secure a valid prescriptive title.[3]

Double titles and prescription.

The same person may base his claim to a property on two distinct investitures. This is called possession on double titles, which the following examples illustrate:—(1) If a person has right to heritage under two titles—the one limited (*e.g.*, an entail) and the other unlimited (*i.e.*, fee-simple)—and possesses the heritage for forty years, without completing a feudal title in his person, the limited title, called the *lex feudi*, regulates the succession to the estate;[4] but (2) on the other hand, if such person completes his title under the unlimited or fee-simple title, and possession for the prescriptive period follows on the title so completed, the limited title ceases to regulate the succession to the estate,[4] in respect that the rights under the unlimited title are fortified by prescription, and also that, although any of the substitutes under the limited title might during the running of prescription have insisted on the possessor

[1] See Lord Adam in *Glen*, 9 R. 317; see Stair, 2, 12, 20; Ersk. 3, 7, 4; Millar on Prescription, 14; *Heriot's Hospital*, M. 10,786: and see Lord Craighill in *Glen*, *supra*; *Aytoun*, 11 S. 676.

[2] *Auld*, 7 R. 663.

[3] *Hinton*, 10 R. 1110, and see H.R. 260 for other cases; and see further on the positive prescription, H.R. 260.

[4] For authorities, see H.R. p. 267.

making up his titles under the limited title, that right is barred by prescription. Again, (3) if a person has right to lands as heir under the last investiture, and has also right under a personal title, both the last investiture and the personal title being unlimited, the personal title regulates the succession to the lands, although he completes a title to them under the last investiture, and it is not extinguished by prescription.[1] (4) But if a person, having right as in the last case, makes up a title as heir under the last investiture, he can evacuate the destination in the personal title by obtaining a new investiture,[2] or by executing a new conveyance,[2] of the lands.

Registers to be searched.

VI. Registers to be searched for Incumbrances and Diligences.—Not only is a proprietor of heritage who has contracted to sell, or to feu, or to burden it bound to show a valid title to the subjects, but he is also bound, if there is no contrary agreement, to furnish a search showing that the subjects are free from incumbrances and diligences, other than those which have been disclosed to and agreed to by his disponee.[3] If incumbrances or diligences—it matters not when constituted, or whether disclosed by the registers or not—exist, such proprietor is bound to have them removed, otherwise the buyer, feuar, or lender may resile from the transaction.[4]

The registers to be searched are—

1. Sasine (or Property) Registers.

(1) The Particular Register of Sasines, etc., for the district or shire in which the lands are situated. These local registers, which were kept at a town in each district or shire, were discontinued at different dates by the Land Registers Act, 1868.[5] The record volumes and minute-books were transmitted at certain intervals to the General Register House, Edinburgh. (2) The General Register of Sasines for all parts of Scotland, kept at Edinburgh, and ending 31st December 1868.[6] (3) The General Register of Sasines (divisional and current), commenced

1 For authorities, see H.R. 267.

2 See authorities, H.R. 268; and on vicennial prescription of retours, see H.R. 268 *et seq.*

3 Bell's Lect. ii. 712; Duff, 183 *et seq.*

4 See H.R. 270.

5 31 & 32 Vict., c. 64, s. 8.

6 See p. 69, *supra*.

on 1st January 1869, and so kept that there are separate presentment books, minute-books, and register volumes for writs applicable to each county,[1] the barony and regality of Glasgow, and also the stewartry of Kirkcudbright, being each treated as a county for registration purposes,[1] and the counties of Orkney and Zetland having a division between them after the passing[2] of the Registration of Certain Writs Act, 1891.[3] (4) The Burgh Registers (established by 1681, c. 11) in the case of burgage subjects. (5) The Register of Booking in Paisley in the case of lands held by booking tenure. In the Sasine Registers are recorded all property writs, such as feu-charters, dispositions, notarial instruments, and the like, as well as all writs constituting, transmitting, restricting, or discharging real burdens or other incumbrances.

2. Personal Registers, or Records of Personal Diligence.

(1) Register of Abbreviates of Adjudications,[4] established by Statute 1672, c. 19, in which are recorded notices of adjudication, abbreviates of adjudication proper, and discharges thereof, and abbreviates of the confirmation of trustees in sequestrations, and abbreviates of bankrupts' discharges. (2) General Register of Inhibitions,[5] kept in Edinburgh for the whole of Scotland, in which are recorded notices of inhibitions, letters of inhibition, summonses containing inhibitions, notices of reduction, letters of interdiction, memoranda of renewals of inhibitions, discharges of inhibitions, abbreviates of petitions for sequestration, and abbreviates of bankrupts' discharges. (3) Particular Registers of Inhibitions (now all discontinued) for the counties in which the subjects are respectively situated, kept at the county towns. By the Land Registers Act, 1868, the Particular Registers of Inhibitions were abolished as at 31st December 1868, and the minute-books of the General (4) Register of Inhibitions and of the Register of Abbreviates of

1 31 & 32 Vict., c. 64, s. 3.
2 11th May 1891.
3 54 Vict., c. 9, s. 1 (3).
4 See 1661, c. 31.
5 1581, c. 119; 1600, c. 13; 1672, c. 16, sect. 32.

Adjudications were combined, and there is now only one minute-book and index for the two registers.[1]

Before 1868 inhibitions were effected by letters passing the Signet published at the market cross of the head burgh of the jurisdiction of the domicile, or if the debtor was furth of Scotland, at the market cross of Edinburgh and pier or shore of Leith, or, after the commencement of the Court of Session Act, 1850,[2] at the office of the Keeper of Edictal Citations; and registration of them did not require to follow on this publication till forty days thereafter. The result was that during these forty days there might be an effective inhibition which an intending purchaser could not discover from the records.[3] To provide against such an inhibition a search required to be made in the Signet Office, through which all letters of inhibition pass, for forty days prior to the close of the transaction, and for a year previous to that, as the letters of inhibition were valid if executed within a year after they were issued.[4]

The Land Registers Act, 1868,[5] made registration in the General Register of Inhibitions equivalent to the old form of publication, and the Court of Session Act, 1868, made it competent to have the warrant of inhibition inserted in the will of a summons passing the Signet.[6]

Inhibitions.

The Titles to Land Consolidation Act, 1868, makes it competent, before or after execution of any inhibition, whether by separate letters or contained in a summons before the Court of Session, to register in the General Register of Inhibitions a notice thereof; and if the inhibition itself and the execution of it be recorded not later than twenty-one days thereafter, the inhibition has effect from the registration of the notice, but otherwise only from the date of the registration of the inhibition and execution thereof.[7] The Titles to Land Consolidation Act, 1868, also introduces a short form of letters of inhibition,[8] and provides that no inhibition is to have effect against *acquirenda*,

Effect of inhibition against *acquirenda*.

[1] 31 & 32 Vict., c. 64, ss. 16 and 17. As to Register of Entails and Register of Interruptions, see p. 99, *infra*.

[2] 13 & 14 Vict., c. 36, s. 22.

[3] *Cruickshanks*, M. 8393.

[4] Bell's Lect. ii. 1188.

[5] 31 & 32 Vict., c. 64, s. 16.

[6] 31 & 32 Vict., c. 100, s. 18.

[7] S. 155, which also gives form of notice (schedule PP).

[8] S. 156 and schedule (QQ), and Act of Sederunt 18th Nov. 1871.

unless where an estate is destined, at the date of recording such inhibition, or previous notice thereof to the inhibited person, by a deed of entail or other indefeasible title.[1] Prior to this enactment inhibitions covered any heritable property acquired after the inhibition if the letters of inhibition were so expressed.

Beginning of litigiosity.

Prior to the Act the execution of a summons of reduction of a deed relating to lands, or of a summons of adjudication, or of constitution and adjudication combined, for debt, or in security, or in implement, created litigiosity; and accordingly the pursuer in the action might be secured against the voluntary deeds of the defender, even in a question with onerous third parties, although no notice of the action appeared on record. The Act provided that such summonses should not render litigious the lands to which they referred, except from and after the date of registration of a notice of the summons.[2]

Inhibitions prescribe in five years.

The Conveyancing Act, 1874, enacts (*a*) that all inhibitions subsisting at the commencement of the Act shall prescribe in five years from the date of the Act; and (*b*) that all inhibitions recorded after the commencement of the Act shall prescribe in five years from their taking effect; but (*c*) that an inhibition may be renewed from time to time for further periods of five years by the registration in the Register of Inhibitions of the inhibition or a memorandum in a form given by the Act.[3]

The following table shows what searches were and are, according to general practice, required by the purchaser of a property before and after 1874:—

I. Before 1874.

(A) *Against the lands.*

(1) In the Particular Register of Sasines applicable to the lands, and

(2) In the General Register of Sasines,

for a period of forty years prior to the transaction to the date of the transaction or the close of the Register.

1 S. 157.. 2 S. 159. 3 S. 42.

And After 1868.

(3) In the division of the General Register of Sasines applicable to the lands,
from the commencement of the Register to date;

or

(1) In the Burgh Register of Sasines applicable to the lands,
for forty years prior to the transaction;

or

(1) In the Register of Booking for the same period.

(B) *Against each proprietor who had held the lands during the forty years prior to the transaction.*

(1) In the Register of Abbreviates of Adjudications,
for the period during which he was in possession or to the close of the Register;

(2) In the Particular Register of Inhibitions applicable to the lands, and

(3) In the General Register of Inhibitions,
from a date forty years prior to the transaction to the date of his successor's infeftment or the close of the Register.

And After 1868.

(4) In the Register of Inhibitions and Adjudications,
from the commencement of these Registers to the date of his successor's infeftment.

II. After 1874.

(A) *Against the lands.*

(1) In the Particular Register of Sasines,

(2) In the General Register of Sasines,

(3) In the division of the General Register of Sasines applicable to the lands,

or

(1) In the Burgh Register of Sasines,

or

(1) In the Register of Booking,
for the same periods as before 1874.

(B) *Against each proprietor who has held the lands during the forty years prior to the transaction.*

(1) In the Register of Abbreviates of Adjudications,
(2) In the General Register of Inhibitions,
(3) In the Particular Register of Inhibitions,
from a date forty years prior to the transaction to the date of his successor's infeftment or the close of the Register, though it is probably enough to search in the Registers of Inhibitions for a period of five years prior to the transaction.
(4) In the Registers of Inhibitions and Adjudications,
from the commencement of these Registers to the date of his successor's infeftment.

Register of Entails.

In addition to the registers named above, there may require to be a search in the Register of Entails, if there is any reason for supposing that the lands may have been included in a deed of entail.[1]

VII. Burdens not disclosed by Search.—A certificate of search does not disclose many burdens, such as feu-duties, real burdens, etc., although these may appear in the recorded writs; and, besides, there may be several burdens affecting lands which do not appear in the registers. Among the burdens not disclosed by a search, and even not appearing on record, may be these:—

Constitution of negative servitudes.

1. *Courtesy.* 2. *Terce.* 3. *Servitudes.*—Negative servitudes, by which the servient owner is limited in the absolute use of his tenement by a right in the dominant owner, can be constituted only by grant or agreement in writing which does not require to appear on record to be valid against singular successors.

Constitution of positive servitudes.

Positive servitudes, which enable the dominant proprietor to exercise some act of use, which otherwise might have been prevented, over the servient subject, may be constituted (*a*) by direct grant or agreement, in writing, which has, in order to be effectual against singular successors, either to appear on record, or to be followed by such use, called *quasi* possession, as the nature of the right admits of; or (*b*) by

[1] Bell's Lect. ii. 716.

prescriptive possession alone, without writing other than infeftment in the dominant tenement; or (*c*) by implied grant in cases where the owner of two neighbouring tenements alienates one of them or conveys both to different disponees, and either a servitude over the tenement retained or one of the two disponed is absolutely necessary to the enjoyment of the other, or such a servitude is necessary for the convenient and comfortable enjoyment of the other. A servitude may be extinguished (*a*) by the discharge in writing of the dominant proprietor; (*b*) by the provisions of an Act of Parliament; (*c*) *confusione*, when the same person becomes owner of both the dominant and the servient tenements; (*d*) by the long negative prescription; (*e*) by acquiescence on the part of the dominant owner in the destruction of the servitude; and (*f*) by total destruction of the dominant or the servient tenement. 4. *Leases, unless those recorded in terms of the Registration of Leases Act*, 1857. 5. *Claims of Ancestors' Creditors, under* 1661, *c.* 24. 6. *Objections arising under the Act* 1621, *c.* 18.—This Act provides—(*a*) that all alienations by a debtor of any of his lands or other property to any conjunct or confident person, gratuitously or without a just consideration, may be reduced at the instance of a true and just creditor; but (*b*) that, where such disponee reconveys the property to a *bonâ fide* third party for just consideration, the sale is not reducible, but the seller is accountable for the price to the debtors' creditors. 7. *Objections on the ground of Forgery.*—The positive prescription does not bar challenge of a deed on the ground of "falsehood"[1]—*i.e.* forgery.[2] An objection on the ground of forgery can be urged even against a singular successor.[3] In the case of a disposition impetrated by fraud, it is now settled that, although the fraud may be pleaded against the guilty party or his gratuitous representatives, yet it will not affect a *bonâ fide* onerous disponee. It cannot, however, be said to be yet definitely decided whether the impetration of a deed by force or fear is or is not pleadable against such a disponee. 8. *Heritable Securities con-*

By implied grant.

Extinction of servitudes.

Leases.

Claims of ancestors' creditors.

Objections under 1621, c. 18.

Fraud, or force, or fear.

Heritable securities.

[1] 1617, c. 12.
[2] *Duke of Buccleuch*, 5 S. 57.
[3] Duff, 184.

stituted before the date whence the Prescriptive Title runs, yet, in consequence of interruption, not falling under the Negative Prescription. 9. *Adjudications constituted before the beginning of the prescriptive period, and followed by possession.* 10. *Minority and Legal Disability.*—Neither the titles nor searches disclose the years of minority which suspend the running of prescription, but the non-disclosure of these years may not now be formidable, because uninterrupted possession on an *ex facie* valid irredeemable title, duly recorded, for thirty years, since 1874, excludes deduction or allowance on account of the years of minority or less age or other legal disability of those against whom the prescription is used and objected.[1] 11. *Claims for Succession Duty and Estate Duty.* 12. *Claims on Real Warrandice.* — Prescription on an infeftment in real warrandice begins to run only after eviction has taken place; but a burden constituted by lands being conveyed in real warrandice is worked off by the operation of the positive prescription, as the title to the principal subjects is thereby secured. 13. *Interruption* of the positive prescription. 14. *Litigiosity.* —Prior to 1868, the execution of a summons to attach the lands of a debtor, or to annul a person's title to an estate, created litigiosity, and a search of the records did not show that the lands had been rendered litigious. The Titles to Land Consolidation Act, 1868, removed this defect in the case of any summons of reduction, constitution, adjudication, or constitution and adjudication combined. 15. *Claims on the ground of Deathbed.*—The Act 34 & 35 Vict., c. 81, abolished reductions *ex capite lecti* of deeds granted by anyone who died after 16th August 1871. 16. *Securities for repairs on subjects in burghs constituted by jedge warrant of the Dean of Guild Court.*[2] 17.

Adjudications.

Minority and legal disability.

Succession duty and estate duty.

Real warrandice.

Interruption.

Litigiosity.

Deathbed.

Jedge warrants.

It has already been stated that the seller, in the absence of agreement to the contrary, is bound to discharge the subjects sold of burdens whether these appear on record or not. A seller is not, however, bound to disencumber the lands of the feu-duty.

Feu-duty.

[1] On legal disability see Millar on Prescription, 100 *et seq.*

[2] For authorities relating to this paragraph see H.R. 283 *et seq.*

Casualties, building restrictions, servitudes, etc.

A seller is bound to discharge casualties due in respect of the lands at the date of sale.[1] A purchaser, however, is probably not entitled to insist on the removal of restrictions which are of an ordinary character, or are common and familiar, and such as the buyer may reasonably be supposed to have contemplated, even although he has had no access to the title-deeds prior to his offer.[2] A servitude, unless of a heavy description, will not found a claim against the seller.[3]

Purchaser's private knowledge of burdens.

A buyer who, after his purchase, obtains knowledge of burdens which attach to the seller's title, is entitled to require the discharge of them.[4]

Right to searches may be discharged.

The right on the part of a purchaser to have searches produced or incumbrances discharged may be expressly renounced by the contract of sale.[5]

VIII. Obligation by Purchaser to take Title as it stands.—When a contract of sale of heritage contains nothing to the contrary, a purchaser is entitled to an unexceptionable title,[6] and is not bound to take one either defective or liable to challenge or attended with doubt.[7] It is insufficient for a seller to offer a progress against which no challenge has been made, with warrandice in case of challenge;[8] and the rule observed by the Court is, that if a purchaser of heritage states an objection which is not without substance to a title tendered, he is entitled to obtain, at the expense of the seller, the decision of the Court regarding his objection, although it is not sustained, before payment of the price.[9] Moreover, the Court will not insist on a purchaser's taking a title to which reasonable exception may be taken.[10]

Obligation to take title as it stands.

Parties to a contract of sale may stipulate that the buyer

[1] *Gardiner*, M. 15,037; and see *Straiton Estate Co.*, 8 R. 299.

[2] See Duff, 158; *Robertson*, 4 D. 121; *Whyte*, 6 R. 699; but comp. *Urquhart*, 13 S. 844; and *Macdonald*, 1 F. 68.

[3] *Gordonston*, M. 16,606; and see *Kelvinside Estate Co.*, 6 R. 995; Bell's Lect. i. 218.

[4] *Ralston*, 8 S. 927.

[5] *Davidson*, 8 R. 990; and see also *Wood*, 13 R. 1006.

[6] *Dick*, 2 W. & S. 522, 9 S. 93, 5 W. & S. 712; *Nairn*, M. 14,169; *Smith*, 5 S. 340; *Robertson*, 4 D. 121; *Whyte*, 6 R. 699.

[7] *Duke of Devonshire*, 1 R. 1056 (a decree in absence liable to reduction); *Brown*, 12 S. 176; *Dunlop*, 11 D. 1062, 12 D. 518; *Rodger*, 21 D. 1022; *Lockhart*, M. 14,176; and see *Traill*, 5 R. 25.

[8] *Little*, M. 14,177; *Nairn*, *supra*; and comp. *Paton*, M. 14,170.

[9] *Howard and Wyndham*, 17 R. 990; *Walker*, 23 R. 347; *Dundee Calendering Co.*, 8 M. 289; *Kerr*, 14 D. 864; aff. 1 Macq. 736; *Hope*, 13 D. 1268; *Cameron*, 22 R. 293.

[10] See, *e.g.*, Lord Deas in *Duke of Devonshire*, 1 R., at p. 1063.

shall take the title as it stands. Such a stipulation, however, is not literally construed; its effect is (*a*) that the purchaser is not bound to accept a title which is not marketable, and which cannot by any expenditure on his part be made marketable; but (*b*) that if the title held by the seller is subject only to a defect which can be remedied, the purchaser has to implement the contract of sale, and remedy the defect at his own expense.[1]

[1] *Carter*, 1890, 18 R. 353; *Anderson*, Dec. 4, 1818, F.C.; *Carruthers*, 4 S. 34; *Sorley's Trs.*, 10 S. 319; *Rowand*, M. 14,178; *Waddell*, 6 S. 999; *Young*, 11 D. 1482; *Davidson*, 8 R. 990; *Wood*, 13 R. 1006.

CHAPTER VI

DISPOSITION OF PROPERTY OF SUBJECTS HELD FEU, AND COMPLETION OF DISPONEE'S TITLE PRIOR TO THE COMMENCEMENT OF THE CONVEYANCING ACT, 1874; CHARTERS AND WRITS OF CONFIRMATION; CHARTERS AND WRITS OF RESIGNATION; AND COMBINED CHARTERS OF RESIGNATION AND CONFIRMATION; DISPOSITION IN ITS PRESENT FORM, AND INFEFTMENT THEREUNDER

Disposition *v.* feu-right.

THE disposition is the deed by which a proprietor, duly infeft, transmits his right of property to another, whilst the object of the feu-charter, feu-contract, or feu-disposition is to create a new fee.

Disposition prior to the Commencement of the Conveyancing Act, 1874.

Completion of title by confirmation or by resignation before 1874.

The steps taken prior to the commencement of the Conveyancing Act, 1874, for transmitting the *dominum utile* of subjects held feu from a proprietor, whose title was complete, to another, were these:—(*a*) a disposition; (*b*) infeftment thereon; and (*c*) a charter or writ of confirmation granted by the superior: or, alternatively, these:—(*a*) a disposition; (*b*) a charter or writ of resignation by the superior; and (*c*) infeftment. If the steps first enumerated were taken on behalf of the disponee, his title was said to be completed by confirmation; and if the steps second enumerated were followed, his title was said to be completed by resignation. Whether the title was completed by confirmation or by resignation, the intervention of the superior was, according to the law as it stood before the commencement of the Conveyancing Act, 1874, essential; but such intervention was rendered unnecessary by

that Act, which provides that infeftment implies entry with the superior, and renders it incompetent for superiors to grant charters or writs either of confirmation or of resignation. The result is, that since 1874 a disponee under a disposition requires, in order to complete his title, to follow the same method which a disponee under a feu-charter now adopts in taking infeftment.

Form of disposition before 1845.

The clauses of the disposition before the passing of the Infeftment Act, 1845,[1] were these:—I. Narrative Clause. II. Dispositive Clause, containing the words of conveyance, the destination, the description of the subjects, the reservations, conditions, provisions, burdens, and limitations of the grant. III. Obligation to infeft, and manner of holding. IV. Procuratory of Resignation *in favorem*. V. Clause of Warrandice. VI. Assignation of Writs and Rents from a certain time. VII. Clause of Warrandice of that Assignation. VIII. Obligation to free the subjects of Public Burdens, etc. IX. Clause of Delivery of Titles. X. Clause of Registration. XI. Precept of Sasine. XII. Testing Clause.[2]

Differences in form between feu-charter and disposition.

If the form of the feu-charter and of the disposition in use prior to 1845[3] be compared, these points of dissimilarity between the two writs will be noticed:—(*a*) that whilst the dispositive clause in the feu-charter *dispones in feu-farm* to the disponee, the dispositive clause in the disposition simply *dispones* to the disponee: (*b*) that whilst the feu-charter contains a clause of *tenendas*, expressing a *de me* holding—the holding appropriate to a feu-right—the disposition contains an obligation to infeft the disponee by an alternative manner of holding —*i.e.*, *a me vel de me:* (*c*) that whilst the feu-charter contains a clause of *reddendo*, setting forth the feu-duty and other annual prestations of the grant exigible by the superior, the disposition does not contain such a clause: and (*d*) that, whilst the feu-charter does not, the disposition does, contain a procuratory of resignation.

Infeftment Act, 1845.

By the Infeftment Act, 1845,[1] a short form of the precept

[1] 8 & 9 Vict., c. 35.
[2] See Jur. Styles (4th ed.), i. 94; Duff, 187.
[3] See p. 14, *supra*.

of sasine was introduced, which might be used in place of the older and longer form.

Lands Transference Act, 1847.

The principal changes introduced by the Lands Transference Act, 1847, were these:—

Short statutory forms were introduced for the following clauses:—(1) *clause declaring the term of entry*, which was formerly embodied in the clause of obligation to free the subjects of public burdens, but after 1847 came after the dispositive clause; (2) *obligation to infeft*; (3) *procuratory or clause of resignation*, taking the place of the old procuratory of resignation; (4) *assignation of writs and evidents*, including the clause of delivery of writs, which used to be a separate clause; (5) *assignation of rents*, which was formerly combined with the assignation of writs; (6) *obligation to free and relieve the purchaser of feu-duties, casualties, and public burdens*; (7) *clause of warrandice* relating both to the lands and to the writs and evidents, which were formerly the subject of two separate clauses of warrandice; (8) *clause of registration*; (9) *precept of sasine*. While in the older forms of the disposition the real burdens were set forth fully in the dispositive clause, the Act made it competent to import real burdens by reference to them as set forth at full length in a recorded instrument.

Titles to Land Act, 1858.

The Titles to Land Act, 1858,[1] which specially declared[2] that nothing contained in it should prevent the constitution, transmission, or completion of land rights by the form in use prior to the passing[3] of the Act, (1) made it competent, immediately before the testing clause of any conveyance, to insert a clause of direction specifying the part or parts of the conveyance which the granter desired to be recorded in the Register of Sasines;[4] (2) made the clause of obligation to infeft and precept of sasine unnecessary;[5] (3) declared that a clause of resignation in any conveyance should be held to import a resignation *in favorem* only, unless specially expressed to be a

[1] 21 & 22 Vict., c. 76.
[2] S. 20.
[3] 2nd August 1858.
[4] S. 3, re-enacted, with variations, by s. 12 of 31 & 32 Vict., c. 101; see p. 24, *supra*.
[5] S. 5, re-enacted by s. 5 of 31 & 32 Vict., c. 101.

resignation *ad remanentiam*;[1] (4) made new provision for the importation of descriptions by reference;[2] (5) provided that, where several lands were comprehended in one conveyance in favour of the same person or persons, it should be competent to insert a clause in the conveyance giving the lands a general name by which they should be designed and known in future;[3] and (6) allowed all deeds, having a testing clause, to be partly written and partly printed or engraved.[4]

Titles to Land Consolidation Act, 1868.

The Titles to Land Consolidation Act, 1868,[5] repealed *in toto* the Lands Transference Act, 1847,[6] and the Titles to Land Act, 1858,[7] but re-enacted, with some variations, the provisions of these Acts relating to the form of the disposition. The Act declared the following clauses unnecessary:—(a) *clause of obligation to infeft*, or (b) *precept of sasine*, or (c) *warrant of infeftment*; and provided short forms of (a) *clause declaring the term of entry*; (b) *clause expressing the manner of holding*; (c) *procuratory or clause of resignation*; (d) *clause of assignation of writs and evidents*; (e) *clause of assignation of rents*; (f) *clause of obligation to free and relieve of feu-duties and casualties* due to the superior *and of public burdens*; (g) *clause of warrandice*; and (h) *procuratory or clause of registration for preservation and execution*. The import of these clauses, so far as still in use, has been explained in dealing with clauses of the feu-charter.[8] The Act also provided a form for importing by reference[9] real burdens into a conveyance, for the description of lands by a leading name and reference to a description in a prior recorded deed,[10] and for the identification of lands by a general name.[11]

Obligation to Infeft, and Manner of Holding.

Origin and effect of *a me vel de me* holding.

Prior to the Lands Transference Act, 1847,[12] the disponer, in the obligation to infeft, usually obliged himself to infeft the

[1] S. 5; see p. 112, *infra*.

[2] S. 15, amended first by s. 34 of 23 & 24 Vict., c. 143, and then re-enacted with amendments by s. 11 of 31 & 32 Vict., c. 101, which was repealed and re-enacted with alterations by s. 61 of 37 & 38 Vict., c. 94.

[3] S. 16, re-enacted, with variations, by s. 13 of 31 & 32 Vict., c. 101.

[4] S. 34, re-enacted, with alterations, by s. 149 of 31 & 32 Vict., c. 101; and see Moveable Rights, p. 52.

[5] 31 & 32 Vict., c. 101.

[6] 10 & 11 Vict., c. 48.

[7] 21 & 22 Vict., c. 76.

[8] See p. 54 *et seq.*

[9] S. 10; see p. 52.

[10] S. 11; see p. 33.

[11] S. 13; see p. 34.

[12] See p. 106, *supra*.

disponee by two manners of holding. These alternative holdings, or the holding *a me vel de me*,[1] as it came to be called, had their origin in a device to evade the rule that a vassal could not, *invito superiore*, voluntarily alienate his lands so as to substitute a new vassal in his place. Prior to the seventeenth century, in cases where it was the object of a seller and a purchaser not to create the relationship of superior and vassal between them in perpetuity, but at once to give security of title to the purchaser, with power to him to substitute himself sooner or later in the seller's place, the seller granted two separate deeds to the purchaser. Of these two deeds, the one was called a charter *de me*, because it bore that the lands were disponed to be held of the seller, *i.e.*, *de me*; and the other was called a charter *a me*, because it bore that the lands were disponed to be held of the seller's superior, *i.e.*, *a me*, or, as it may be more fully expressed, *a me de superiore meo*. On obtaining these two deeds, the buyer expede and recorded an instrument of sasine, the form of which was such that it could be referred either to the holding *de me* in the one deed or to the holding *a me* in the other; and the infeftment thus taken, even before it was confirmed by the superior, gave the disponee, in virtue of the *de me* holding, a title to the lands, which was valid against the seller and his subsequent disponees as well as his creditors, but created a mid-superiority in the seller's favour. In other words, the infeftment, until confirmed, was ascribed to the *de me* holding, and the result was this—(*a*) a real right to the lands was vested in the purchaser; (*b*) a fee of mid-superiority was created in favour of the seller; (*c*) the seller remained the vassal of his own superior, and liable to him for the prestations of the feu; and (*d*) the purchaser's superior was the seller, the purchaser, however, being liable to relieve the seller of the annual prestations exacted from the seller by his superior. But the infeftment, when confirmed by the seller's superior, completely divested the seller of everything, and placed the purchaser in his room as vassal in the lands, and was then ascribed to the *a me* holding, and the deed with the *de me*

[1] Also expressed *a me de superiore meo vel de me*.

holding was dropped from the progress of titles. The effect of the confirmation of the infeftment accordingly was:—(*a*) to extinguish the fee of mid-superiority in the seller created by the infeftment *de me*, and thereby to extinguish the relationship of superior and vassal which had subsisted between the seller and the purchaser; (*b*) to extinguish the relationship of superior and vassal between the superior of the seller and the seller, and thereby to end the seller's liability for implement of the future prestations of the feu; and (*c*) to substitute the relationship of superior and vassal between the seller's superior and the purchaser in lieu of the relationship which had subsisted between the superior and the seller, and, as a consequence, to make the purchaser liable in implement of the prestations of the feu.

Disposition with alternative holding.

The separate charters, *de me* and *a me*, granted by a disponer to a disponee gave place, at least as early as the beginning of the seventeenth century, to one deed, viz., the disposition with an alternative manner of holding, *a me vel de me*, and a precept of sasine applicable to either holding. The infeftment on such a disposition, until it was confirmed by the superior, was ascribed to the *de me* holding, and gave the disponee a valid title to the lands, with the disponer as his immediate superior; but the infeftment, when confirmed, was then ascribed to the *a me* holding, and substituted the disponee as a vassal in room of his disponer. The infeftment on the precept of sasine was termed base until confirmed, and public when confirmed.[1] After confirmation, the disponee was not entitled to impute his infeftment to other than the *a me* holding.[2]

Form of obligation to infeft in use prior to Lands Transference Act, 1847.

The clause of obligation to infeft by two separate manners of holding, *i.e.*, *de me* and *a me*, in the old form was as follows:—

In which lands and others above disponed, I hereby bind and oblige myself and my foresaids to infeft and seise the said B and his foresaids, upon their own charges and expenses, and that by two several infeftments and manners of holding; one thereof to be holden of me and my foresaids in free blench, for payment of a penny Scots in name of blench farm, at Whitsunday yearly, upon the ground of the said lands, if asked only, and freeing and relieving us of all feu-duties and other duties and services exigible out of the said lands and others by our superiors thereof; and the other of the said infeftments to be holden from me and my fore-

[1] *Bishop of Aberdeen*, M. 3011, 3012, 2 Ross' L.C. 1; *Bellenden*, 2 Ross' L.C. 2; *Bothwell*, M. 3012, 2 Ross' L.C. 15.

[2] *Lord Chancellor*, M. 3012, 2 Ross' L.C. 15; *Bothwell*, *supra*.

saids, of and under our said superiors, in the same manner that I, my predecessors and authors, held, hold, or might have holden the same, and that either by resignation or confirmation, or both, the one without prejudice of the other.

Lands Transference Act, 1847.

This form continued in use until the commencement of the Lands Transference Act, 1847. That Act introduced a new form of the clause of obligation to infeft, which ran thus:—"And I"—that is, the disponer—"oblige myself to infeft the said [*here insert the name of the disponee*] and his foresaids, to be holden *a me* [*or* de me *or* a me vel de me, *as the case may be*];"[1] and the Act made this clause, so far as it relates to *a me* or to *a me vel de me* holdings, equivalent to the full specification of the manner of holding in the old form.[2]

Titles to Land Acts, 1858 and 1860.

The Titles to Land Act, 1858, made a clause of obligation to infeft unnecessary, and declared that, if land should be disponed to be holden *a me* only, or *a me vel de me*, the clause so expressing the manner of holding should imply that the lands were to be held in the manner expressed in the Lands Transference Act, 1847, with reference to obligations to infeft *a me* or *a me vel de me* respectively.[3] The Act of 1858 also declared that, where no holding was expressed, the conveyance should be held to imply that the lands were "*to be holden in the same manner in which the granter of the conveyance held or might have held the same*",[4] but the Titles to Land Act, 1860, declared that the words here italicised should be construed to mean that the lands were to be held *a me vel de me* where the investiture of lands contained no prohibition either against subinfeudation, or against an alternative holding, and *a me* only where the investiture contained such prohibition. The Act of 1860, however, provided that where the investiture contained such prohibition the conveyance or instrument should, if an entry in the lands therein specified or thereby conveyed was expede with the superior within twelve months from the date of such conveyance or instrument, have the same preference in all respects from the date of recording in the appropriate Register of Sasines as if it had contained an *a me vel de me* holding, and the investiture had not contained any prohibition against subinfeudation, or against an alternative

[1] S. 1, and schedule (A).
[2] S. 2.
[3] S. 5.
[4] S. 5.

holding.[1] Repealing the Lands Transference Act, 1847, and the Titles to Land Acts, 1858 and 1860, the Titles to Land Consolidation Act, 1868,[2] renewed the enactments in force at the date of the repeal, as to the form and interpretation of the clause setting forth the manner of holding. Titles to Land Consolidation Act, 1868.

The following points are worthy of note in connection with the clause of obligation to infeft and manner of holding:—(1) Prior to the Titles to Land Act, 1858, if a disposition contained no holding, or if the obligation to infeft was general, *i.e.*, did not specify the manner of holding, the holding was deemed to be *a me*.[3] (2) Infeftment in virtue of a disposition with an *a me* holding, express or implied, did not before 1874, until followed by confirmation, divest the disponer or invest the disponee.[4] (3) After the Titles to Land Act, 1860, till the commencement of the Conveyancing Act, 1874, when a disposition contained no manner of holding, an *a me vel de me* holding was implied in cases in which the titles of the lands contained no prohibition against subinfeudation or against an alternative holding; but an *a me* holding only was implied in cases in which the titles contained such prohibitions, or either of them.[5] (4) When a purchaser of heritage did not stipulate for an alternative holding, the seller was not bound to grant him a disposition with such a holding.[6] (5) Whilst a holding *de me* is still inserted in a feu-right, no holding has been necessary in a disposition since the commencement of the Conveyancing Act, 1874. Rules regarding obligation to infeft and manner of holding.

Procuratory or Clause of Resignation *in favorem*.[7]

The procuratory of resignation was a mandate by the disponer (sometimes called the resigner) authorising the giving back of the lands to the superior thereof, in order that the superior might reconvey them to the disponee (sometimes called the resignatary), to be held of the superior as the disponer himself held them. This was also the import of the Procuratory of resignation prior to 1847.

1 S. 36.

2 Ss. 5 and 6, schedule (B), No. 1.

3 *Buchan*, M. 2258; and *Peebles*, 4 S. 290, 2 Ross' L.C. 17; *Rowand*, *infra*.

4 *Rowand*, 3 S. 196, 2 Ross' L.C. 16; *Peebles*, *supra*; Ersk. 2, 7, 5, 9, and 13.

5 As to whether an alternative holding was a contravention of a prohibition against subinfeudation, see *Colquhoun*, 5 M. 773; and Lord Kinnear in *Church of Scotland*, 7 F. 395.

6 *Miller*, 6 D. 149, 2 Ross' L.C. 17.

7 Duff, 208, 225; Bell's Lect. i. 689.

clause of resignation which, after 1847, superseded the procuratory of resignation. The procuratory of resignation *in favorem* must be distinguished from the procuratory of resignation *ad remanentiam*, which was inserted in, *inter alia*, conveyances in favour of a superior by his vassal, and which authorised the surrender of the lands into the hands of the superior in order that they might remain with him.[1]

Lands Transference Act, 1847.

The form of the procuratory of resignation *in favorem* in use prior to 1847 was as follows:—

Procuratory of resignation.

And for completing the said infeftment by resignation, I hereby make and constitute , and each of them, jointly and severally, my lawful and irrevocable procurators, with full power to them to compear before my superiors of the lands and others above disponed, or their commissioners in their names, having power to receive resignations, and to grant new infeftments thereupon, and there for me and in my name to resign and surrender, as I by these presents resign, surrender, *simpliciter* upgive, overgive, and deliver, All and Whole the lands and others before disponed, all lying and described as aforesaid, and here holden as repeated *brevitatis causa*, with all right, title, and interest which I, my predecessors and authors, had, have, or could pretend thereto, in the hands of my said superiors, or their commissioners authorised as aforesaid, in favour and for new infeftment of the same to be made and granted to the said B and his foresaids, heritably and irredeemably, in due and competent form; acts, instruments, and documents thereupon to ask and take, and generally to do everything concerning the premises which I could have done myself, or which to the office of procuratory in such cases is known to belong; ratifying hereby, and confirming whatever my said procurators shall lawfully do or cause to be done in the premises in virtue hereof.

The Lands Transference Act, 1847,[2] made it unnecessary to use the old form, and introduced a clause of resignation in these terms: "And I resign the said lands and others for new infeftment,"[3] which clause, in a conveyance by a vassal to a stranger, the Act declared to be equivalent to a procuratory of resignation in the terms then in use, or, if inserted in a conveyance by a vassal to his superior, equivalent to a procuratory of resignation *ad remanentiam*.[4] It being found inconvenient to have a clause of resignation which fell to be read as a clause of resignation either *in favorem* or *ad remanentiam*, according to the nature of the disposition in which it appeared,[5] the Titles to Land Act,

Titles to Land Act, 1858.

[1] See p. 136, *infra*.
[2] 10 & 11 Vict., c. 48.
[3] S. 1, schedule (A).
[4] S. 3.
[5] Bell's Lect. ii. 778.

1858,[1] enacted that a clause of resignation in any conveyance should be held to import a resignation *in favorem* only, unless specially expressed to be a resignation *ad remanentiam*, but provided that nothing contained in the Act should prevent an instrument of resignation *ad remanentiam* from being expede and recorded on a conveyance theretofore granted and containing a clause of resignation in the form authorised by the Act of 1847.[2] Repealing the Lands Transference Act, 1847, and the Titles to Land Act, 1858, the Titles to Land Consolidation Act, 1868, made it competent to insert a clause in this form: "And I resign the said lands and others [*or* subjects] for new infeftment or investiture,"[3] and declared such a clause equivalent to a procuratory of resignation *in favorem* only in the terms in use prior to the 30th September 1847,[4] unless specially expressed to be a resignation *ad remanentiam*.[5]

Titles to Land Consolidation Act, 1868.

Prior to the commencement of the Conveyancing Act, 1874, either a procuratory or a clause of resignation *in favorem* was an essential in a disposition when the disponee desired to enter by resignation; but this Act, in making it incompetent to grant charters or writs of resignation, impliedly abolished the procuratory or clause of resignation. Although at common law procuratories of resignation, like precepts of sasine, fell by the death of either the granters or the grantees thereof, the Statute 1693, c. 35, provided that procuratories of resignation, as well as precepts of sasine, might be executed after the death of the parties in whose favour they were made, on condition that instruments of resignation and sasine taken after the death of either party expressed the titles of those in whose favour the resignation was made and to whom the sasine was granted, and that the same were deduced therein.[6] A procuratory or clause of resignation *in favorem* granted by a person base infeft was not a valid warrant for resignation, until his base infeftment was expressly or constructively made public by his superior.[7]

Remarks on procuratory and clause of resignation *in favorem*.

1 21 & 22 Vict., c. 76, s. 5.
2 *Ibid.*
3 S. 5, and schedule (B), No. 1.
4 *I.e.*, before the commencement of the Lands Transference Act, 1847.
5 S. 8.
6 See Duff, 100.
7 See p. 118.

Precept of Sasine prior to the Conveyancing Act, 1874.

Precept of sasine prior to 1874.

The form of the precept of sasine, as altered by successive enactments, has been dealt with in treating of the feu-charter. Before 1858 a precept was a necessary part of a disposition if the disponee desired first to take infeftment, and thereafter to take entry by confirmation. The Titles Act of 1858, however, which allowed infeftment to be taken by recording the conveyance, also made the precept unnecessary, and this provision was renewed by the Act of 1868. These Acts left it competent to take infeftment by means of an instrument of sasine; but an instrument of sasine cannot be expede if the conveyance contains no precept of sasine.

Completion of Disponee's Title by Confirmation or by Resignation prior to the commencement of the Conveyancing Act, 1874.

Entry by confirmation or resignation prior to 1874.

In dealing with the feu-charter it was shown that all that was necessary for the completion of the title of a grantee under a feu-right was, prior to 1858, to take infeftment in virtue of the precept of sasine contained in the feu-right, and after 1858 to record, with a warrant of registration, his feu-right, whether it contained a precept of sasine or not. But prior to the Conveyancing Act, 1874, the disponee under a disposition required the intervention or recognition of the superior of the lands in order to complete his title, and thereby place him in the position of a vassal to his disponer's superior. Such recognition or intervention was embodied in a charter or writ of confirmation, which was obtained from the superior by the disponee after his infeftment, or in a charter or writ of resignation, or, it might be, a combined charter of resignation and confirmation, which was obtained by the disponee before he took infeftment.[1] The method of infeftment by resignation was the same as that followed by the grantee of a feu-charter.

Form of charter of confirmation prior to 1845.

(1) *Charters and Writs of Confirmation.*—The form of the charter of confirmation in use prior to the Infeftment Act,

[1] See p. 118, *infra*.

1845, generally contained these parts:—(1) narrative clause; (2) clause of confirmation; (3) clause declaring the confirmation to be as valid as if the writs confirmed had been engrossed *verbatim*, or as if the confirmation had been made and granted before the taking of infeftment, and dispensing with all defects of the confirmation; (4) the *tenendas*; (5) the *reddendo*; (6) the clause known as the clause *salvo jure cujuslibet* ("reserving always my"—*i.e.*, the superior's—"own right, and the right of all others, as accords of law"; (7) clause of registration for preservation; and (8) testing clause.[1]

Confirming clause in charter, and what it confirmed.

The operative clause was the confirming clause, which either confirmed the lands, and the transmissions and relative infeftments subsequent to the last public infeftment,[2] or confirmed, without confirming the lands specially, the transmissions and relative infeftments, the description of the lands in this case being introduced by way of narrative.[3]

Effect of Lands Transference Act, 1847, on entry by confirmation.

The Lands Transference Act, 1847,[4] empowered any person infeft in lands or heritages in Scotland, holden of a subject-superior, on a conveyance (containing an obligation to infeft *a me* or *a me vel de me*) granted by the person last entered and infeft, or by a person whose own title was capable of being made public by confirmation, or on a decree of special service, or of adjudication or of sale, containing a warrant of infeftment in terms of the Act, to charge the superior to grant a charter of confirmation. The charger was bound, as a condition of obtaining a charter of confirmation, to pay or tender to his superior such duties or casualties as he was by law entitled to receive upon giving entry. The Act also prescribed a short form of the charter of confirmation,[5] by which it was made sufficient to confirm only the lands and the sasine in favour of the person requiring confirmation.

Titles to Land Act, 1858. Writ of confirmation.

The Titles to Land Act, 1858,[6] first made it competent to confirm a recorded deed or instrument of sasine by means of a writ of confirmation written thereon in a form provided by the

[1] Of charter of confirmation before 1845, see Jur. Styles (3rd ed.), i. 561; Bell on Completing Titles, 281; Duff, 212.
[2] Jur. Styles (3rd ed.), i. 564.
[3] *Ibid.* i. 562.
[4] S. 6.
[5] S. 7, schedule (D).
[6] S. 7.

Act.[1] This writ had the effect of confirming all prior deeds and instruments necessary to be confirmed. The superior was bound to confirm if the party desiring confirmation was entitled to an entry by confirmation and produced a writ showing the *tenendas* and *reddendo* of the lands, and tendered such duties or casualties as the superior was entitled to demand.

The Act of 1858 also enacted that in granting charters of confirmation or resignation, or other charters by progress, it should be sufficient to refer to the *tenendas* and *reddendo* of the lands therein contained as set forth at length in any charter or other writ recorded in any public register, and that subject-superiors should be bound, if required, to grant such charters containing such reference in like manner as they were at the date of the Act bound to grant similar charters according to the forms then in use.[2]

Titles to Land Consolidation Act, 1868.

The Titles to Land Consolidation Act, 1868, repealed the provisions regarding confirmation from 1847 onwards above set forth, but in substance re-enacted the provisions which it repealed, as regards (1) the title to compel a superior to grant a charter or writ of confirmation;[3] (2) the competency of writs of confirmation, and the form of charters and writs of confirmation;[4] (3) the importing of the *tenendas* and *reddendo* into writs and charters, by reference;[5] and (4) the confirming by such charters and writs of all prior deeds requiring to be confirmed.[6]

Effect of confirmation and mid-impediments.

Confirmation, in the absence of a mid-impediment, operated *retro* to the date of the infeftment confirmed, making public as from their respective dates all prior base infeftments, notwithstanding the death of both the disponer and the disponee,[7] and operated as a discharge of all prior casualties. The retroactive effect of confirmation, however, was prevented by the existence of what was called a mid-impediment. Thus, suppose that A,

1 Schedule (E).

2 S. 10.

3 Ss. 97 and 98. Section 97, it will be noted, is one of those substituted by the Amendment Act, 1869, 32 & 33 Vict., c. 116, the substituted section supplying an unintentional omission in the original enactment.

4 S. 98, schedule (V), Nos. 1 and 2.

5 S. 100.

6 S. 115.

7 *M'Dowall*, M. 8807, 2 Ross' L.C. 127 (case about a right to vote); *Lockhart*, 16 S. 76, 2 Ross' L.C. 129 (rule in text applied to infeftment proceeding on a precept of *clare constat*); and see *Campbell*, M. 1302.

an entered vassal, disponed his lands first to B by a disposition with an *a me vel de me* holding, and then to C by a disposition with an *a me* or an *a me vel de me* holding, and that B took base infeftment, but did not obtain confirmation, and that C afterwards took infeftment and then obtained a charter of confirmation, the state of the title would have stood thus: A would have been entirely divested, B would have been infeft in the property, and C would have been infeft in the mid-superiority created in favour of A by B's base infeftment, with the result that B's immediate superior would be C, and that the right of C to the mid-superiority would have prevented B from obtaining a charter of confirmation from A's superior, this right in C operating as a mid-impediment against confirmation in B's favour.

Advantages of confirmation over resignation.

(2) *Charters of Resignation, combined Charters of Resignation and Confirmation, and Writs of Resignation.*—Although the transference of feudal rights in land by resignation was more in accordance with feudal rules than their transference by infeftment and confirmation, yet entry by confirmation undoubtedly became the more common in practice, because infeftment in virtue of an *a me vel de me* holding, while giving a real right to the property, made it possible for a singular successor to avoid payment of an untaxed casualty of composition on the death of the last entered vassal by getting the heir of that vassal to make up a title to the mid-superiority constituted in favour of his ancestor by the disponee's infeftment, and by paying relief duty for the entry of such heir.

Act of 1747 with regard to entry by resignation.

In 1747 there was passed the Act 20 George II., c. 50, which first gave to an heir duly served and retoured heir to his predecessor, or to a disponee in right of a disposition or conveyance containing a procuratory of resignation, the right to apply to the Lord Ordinary on the Bills for warrant for letters of horning to charge the superior to grant him new infeftment,[1] the applicant being bound to pay or tender at the time of the charge such fees or casualties as the superior should be entitled to receive on the entry of such heir or purchaser.[2]

[1] S. 12. [2] S. 13.

Procedure for entry by resignation before 1845.

Before 1845 the steps in taking entry by resignation in the case of a disponee whose author was entered with the superior were as follows:—(1) a disposition in favour of the disponee, containing, *inter alia*, a procuratory of resignation in his favour; (2) without infeftment on the disposition, symbolical surrender to the superior, or to his commissioner specially appointed, in presence of a notary public and two witnesses, by the disponee's attorney, by delivery of "staff and baton,"—*i.e.*, as custom construed these words, by delivery of a pen, and redelivery thereof to the disponee's attorney; (3) the expeding of an instrument of resignation *in favorem*; (4) the granting of a charter of resignation[1] by the superior in favour of the disponee, which contained a precept of sasine; and (5) infeftment in favour of the disponee in virtue of the precept of sasine in the charter of resignation, which infeftment was taken after symbolical delivery on the lands by expeding an instrument of sasine, and recording it within sixty days of its date in the appropriate Register of Sasines. The ceremony of symbolical surrender and the expeding of an instrument of resignation *in favorem* had become almost, if not altogether, obsolete long before 1845; and it was specially decided in 1848 that a charter of resignation dated in 1823 could not be validly objected to although no such instrument had ever been expede.[2]

The charter of resignation in use prior to 1845 consisted of these parts:—(1) narrative clause; (2) dispositive clause; (3) *quæquidem* clause, showing how the lands were in the superior's hands; (4) *tenendas*; (5) *reddendo*; (6) clause of registration for preservation; (7) precept of sasine; (8) clause *salvo jure meo et cujuslibet*; and (9) testing clause.

Combined charter of resignation and confirmation.

The combined charter of resignation and confirmation was necessary when the disponer granting a disposition with a procuratory of resignation was not an entered vassal; for resignation was competent only by a vassal into the hands of his own immediate superior. In this case the disponee, in entering by resignation, obtained a charter, which contained not only the

[1] A combined charter of resignation and confirmation would have been used if the immediate disponer had not been an entered vassal.

[2] *Renton*, 11 D. 37, 2 Ross' L.C. 146.

clauses contained in the charter of resignation, but also a confirming clause, which was usually inserted before the clause of consent for registration. The confirming clause confirmed all the writs up to but excluding the disposition in favour of the vassal seeking entry, and thereby put the disponer, as from the date of his infeftment, in the place of an entered vassal.

Infeftment under charter.

After obtaining a charter of resignation, or a combined charter of resignation and confirmation, the disponee (or resignatary) took infeftment under it in virtue of the precept of sasine which it contained, in exactly the same manner as he took infeftment in virtue of the precept of sasine contained in a feu-right or a disposition.

Principle of resignation.

Fictione juris, the superior was by the resignation of the vassal invested in the lands so as to be in a position to dispone them to the resignatary; but the act of resignation did not divest the resigner until the resignatary had taken infeftment.[1]

Infeftment Act, 1845.

The provisions of the Infeftment Act, 1845, regarding the form of the precept of sasine[2] and the taking of infeftment[3] apply to charters of resignation and charters of confirmation and resignation. The Act also expressly abolished instruments of resignation *in favorem*,[4] but provided that the deduction of titles required by the Statute 1693, c. 35, to be made in such instruments should after the date of the Act be made in the charter of resignation.

Titles to Land Acts, 1858 and 1860.

The provisions of the Titles to Land Act, 1858, rendering a precept of sasine unnecessary,[5] making it competent to describe lands by reference,[6] and authorising infeftment by recording the deed on which it is to be taken in the Register of Sasines,[7] apply to charters of resignation. The Act also made it competent to give entry by resignation, by means of a writ written by the superior upon the deed which was the warrant of resignation.[8] The superior became under the Act bound to grant such a writ instead of a charter if required so to do. The

1 Ersk. 2, 7, 23.
2 Ss. 5 and 10 (interpretation clause).
3 Ss. 1, 2, 3, 4, and 5.
4 S. 9.
5 Ss. 5 and 36 (interpretation clause).
6 Ss. 15 and 16.
7 Ss. 1 and 36.
8 S. 9, schedule (F).

party requiring the writ had to be entitled to an entry by resignation, and he had, on demanding it, to pay or tender the superior's duties and casualties, and to produce, if required, a writ showing the *tenendas* and *reddendo* of the lands. The writ operated as a confirmation of all deeds requiring to be confirmed. Infeftment was to be taken by recording the deed with the writ written thereon, and with a warrant of registration also written thereon, in the appropriate Register of Sasines, and such registration was to have the same effect as if a charter had been granted and followed by an instrument of sasine duly recorded. The Act further provided "that the recording of such deed along with such writ *shall* have the effect of an instrument of sasine following on such deed." By mistake the word "not" was omitted after the word "shall," and the result was that writs of resignation by subject-superiors could not be used by disponees without creating a split.[1] But this mistake was corrected by the Titles to Land Act, 1860, which repealed the words above quoted, and declared that the recording of the deed along with the writ should *not* have the effect of an instrument of sasine following on the deed.

Effect of writ of resignation.

Like charters of confirmation, charters of resignation might, under the Act of 1858, import the *tenendas* and *reddendo* of the lands by reference to them as set forth at length in any writ recorded in any public register.[2]

Entry by resignation after 1858.

Accordingly, after 1858, a party desiring to enter by resignation could do so in one of these ways:—(*a*) by recording the disposition containing a procuratory or clause of resignation in his favour, with a writ of resignation from the superior of the lands written thereon, and warrant of registration also written thereon, in the appropriate Register of Sasines; or (*b*) by obtaining a charter of resignation (whether or not it contained a precept of sasine), and recording it with a warrant of registration; or (*c*) by obtaining a charter of resignation containing a precept of sasine, and recording an instrument of sasine thereon.

Titles to Land Act, 1860.

The Titles to Land Act, 1860, made it competent in drawing

[1] See p. 128, *infra*.

[2] 21 & 22 Vict., c. 76, s. 10.

charters of resignation to insert a description of the lands by reference.[1] It also provided that charters of resignation or of adjudication or of sale should, like writs of resignation under the Act of 1858, operate as a confirmation of the whole deeds and instruments necessary to be confirmed.[2] This provision made combined charters of resignation and confirmation unnecessary.

Titles to Land Consolidation Act, 1868.

The Titles to Land Consolidation Act, 1868, whilst repealing the enactments regarding entry by resignation above mentioned contained in the Acts passed between 1845 and 1868, re-enacted them with variations. It renewed the provisions making it competent to the person desiring to enter by resignation to demand, on the conditions stated in the Act of 1858, in his option, either a writ or a charter of resignation.[3]

This Act entitled a person entering with the superior to insist on the superior's merely referring to the *tenendas* and *reddendo* instead of inserting them in full.[4] It authorised the taking of infeftment on a charter of resignation not only by recording the charter, but also by expeding and recording a notarial instrument on it.[5] It also provided for the authentication of charters and writs of resignation.[6]

The following tables summarise the various methods of completion of title by confirmation and by resignation at different dates. The case taken first is that in which the disponer was the last entered vassal, and the case taken next is that in which the disponer, though infeft, was not entered with the superior.

First, suppose that X granted a feu-charter to A, who, being infeft and so entered, disponed the lands to B; B could, on the assumption that his disposition contained the ordinary executive clauses[7] in use at the different dates, complete a title in the following ways:—

1 S. 34.
2 S. 39.
3 S. 99, schedule (V), Nos. 3 and 4.
4 S. 100.
5 Ss. 3, 15, 17, and 99.
6 S. 114.
7 *I.e.*, an obligation to infeft *a me vel de me*, procuratory of resignation, and precept of sasine prior to the Lands Transference Act, 1847; an obligation to infeft *a me vel de me*, a procuratory or clause of resignation, and precept of sasine after 1847 to the commencement of the Titles to Land Act, 1858; and after 1858, a clause of holding *a me vel de me* and a procuratory or clause of resignation, it being unnecessary after the Titles to Land Act, 1858, to have an obligation to infeft and a precept of sasine.

TABLE A.

BY CONFIRMATION.	BY RESIGNATION.
(1) *Prior to the Infeftment Act*, 1845.	
1. Infeftment in favour of B in virtue of precept of sasine in disposition A to B, the procedure for infeftment being (*a*) symbolical delivery;[1] (*b*) expeding an instrument of sasine in B's favour;[2] and (*c*) recording the instrument within sixty days of its date, either in the General Register of Sasines or the Particular Register of Sasines applicable to the lands.[3]	1. Charter of resignation granted by X, the superior, to B, in virtue of the procuratory in disposition A to B.
2. Charter of confirmation granted by X, the superior, to B, confirming to B *either* the lands and disposition and instrument of sasine in his favour, *or* the disposition and instrument, the lands being described *narrative*.[4]	2. Infeftment in favour of B, in virtue of precept of sasine in *charter of resignation*, the procedure for infeftment being as set forth in (*a*), (*b*), (*c*) in opposite column.[5]
(2) *Between the commencement of the Infeftment Act*, 1845, *and the commencement of the Lands Transference Act*, 1847.	
1. Infeftment in favour of B, in virtue of precept of sasine[6] in disposition A to B, the procedure for infeftment being (*a*) expeding an instrument of sasine[7] in B's favour, and (*b*) recording it within B's lifetime,[8] either in the General Register of Sasines or in the appropriate Particular Register of Sasines.	1. Charter of resignation, granted by X to B in virtue of the procuratory of resignation in disposition A to B.
	2. Infeftment in favour of B, in virtue of precept of sasine in charter of resignation X to B, the procedure for infeftment being as set forth in (*a*), (*b*) in opposite column.

[1] See p. 16, *supra*.
[2] See p. 17, *supra*.
[3] See p. 20, *supra*.
[4] See p. 115, *supra*.
[5] Infeftment was taken under a charter of resignation as under a feu-charter or a disposition,—see p. 119, *supra*.
[6] Precept might be in form introduced by the Infeftment Act of 1845, or older form.
[7] The instrument of sasine could be in the form introduced by the Infeftment Act, 1845, if the precept of sasine was either in the form introduced by that Act or in the older form, and in the form in use prior to 1845 if the precept of sasine was in the older form; and where an instrument of sasine in the older form was used, it required to be preceded by symbolical delivery, and to be recorded within sixty days of its date.
[8] See p. 22, *supra*.

BY CONFIRMATION.	BY RESIGNATION.
2. Charter of confirmation granted by X to B, confirming to B *either* the lands and disposition and instrument of sasine in his favour, (*or*) the disposition and instrument, the lands being described *narrativè*.	

(3) *Between the commencement of the Lands Transference Act*, 1847, *and the commencement of the Titles to Land Act*, 1858.

1. No change as regards infeftment.	No change.
2. Charter of confirmation, in form of schedule (D) of Act of 1847, granted by X to B, confirming to B the lands and instrument of sasine in his favour.[1]	

(4) *Between the commencement of the Titles to Land Act*, 1858, *and the commencement of the Titles to Land Act*, 1860.

1. Infeftment in favour of B by recording the disposition A to B, with a warrant of registration thereon in the form of schedule (A), No. 1, of the Act of 1858, in favour of B, within B's lifetime, either in the General Register of Sasines or in the appropriate Particular Register of Sasines.[2]	1. *Either* a writ of resignation in the form of schedule (F) of the Act of 1858, granted by X to B, and written on the disposition by A to B, (*or*) a charter of resignation granted by X to B in the form in use prior to 1858, with this difference, that it did not require to contain a precept of sasine.
2. *Either* a writ of confirmation in form of schedule (E) of the Act of 1858, granted by X to B, and written on the dis-	2. Infeftment in favour of B, *in the case of a writ of resignation being granted*, by recording the disposition in favour

[1] The older form of charter of confirmation could, however, be used. See p. 115, *supra*.

[2] Although a disposition contained no precept of sasine after 1st October 1858, infeftment could be taken under it by recording the disposition with a warrant of registration, (*or*) in the disponee's option, by expeding and recording a notarial instrument in the form of schedule (B) of the Act of 1858 (21 & 22 Vict., c 76), if the disposition was for further purposes and objects, such as a marriage-contract, deed of trust, or deed of settlement; and if a disposition, after 1858, contained a precept of sasine in the form in use prior to 1845, the disponee could either (*a*) record it; or (*b*) expede and record a notarial instrument, if the disposition was for further purposes and objects in the sense of the Act of 1858; or (*c*) expede and record an instrument of sasine in the form introduced by the Infeftment Act, 1845; or (*d*) expede and record, within sixty days of its date, an instrument of sasine in the form in use prior to 1845; but if the precept of sasine was in the form authorised by the Infeftment Act, 1845, the disponee could not take infeftment by the last of these methods. See p. 24, *supra*.

BY CONFIRMATION.	BY RESIGNATION.
position by A to B, confirming in favour of B the recorded disposition, *or* a charter of confirmation granted by X to B in the form in use prior to 1858, confirming the lands and recorded disposition.	of B, and the writ of resignation, with a warrant of registration in favour of B in the form of schedule (A), No. 1, of the Act of 1858, in B's lifetime, either in the General Register of Sasines or in the appropriate Particular Register of Sasines; *or in the case of a charter of resignation being granted*, by recording it, with such warrant of registration, in B's lifetime, either in the General Register of Sasines or in the appropriate Particular Register of Sasines.

(5) *Between the commencement of the Titles to Land Act*, 1860, *and the commencement of the Titles to Land Consolidation Act*, 1868.

No change.	No change.

(6) *Between* 1*st January* 1869 *and the commencement of the Conveyancing Act*, 1874, *i.e.*, 1*st October* 1874.

1. Infeftment in favour of B, *either* by recording the disposition A to B, with a warrant of registration in the form of No. 1 of schedule (H) of the Act of 1868,[1] *or* by expeding and recording a notarial instrument,[2] with such a warrant of registration, the recording in either case being within B's lifetime, either in the General Register of Sasines, or, if it still existed, in the appropriate Particular Register of Sasines.[3] 2. Either a writ of confirmation in form of schedule (V), No. 1, granted by X to B, and written on the disposition A to B (or on the notarial instrument, if	1. *Either* a writ of resignation in the form of schedule (V), No. 3, of the Act of 1868, granted by X to B, and written on the unrecorded disposition by A to B; *or* a charter of resignation in the form of schedule (V), No. 4, granted by X to B. 2. Infeftment in favour of B, *in the case of a writ of resignation being granted*, by recording the disposition, with the writ of resignation written thereon, along with a warrant of registration in the form of schedule (H), No. 1; *or in the case of a charter of resignation being granted*, by recording it, or a

[1] S. 15 of Act of 1868.

[2] See ss. 17 and 141 of Act of 1868. The Act of 1868 allowed a notarial instrument whether the disposition was for further purposes and objects or not.

[3] For times when particular registers abolished, see H.R. 235.

BY CONFIRMATION.	BY RESIGNATION.
instrument used), confirming the recorded disposition (or instrument) in favour of B; *or* a separate charter of confirmation in the form of schedule (V), No. 2, granted by X to B, and confirming to B the lands and the recorded disposition (or instrument).	notarial instrument thereon, with such a warrant of registration, the recording in either case being within B's lifetime, either in the General Register of Sasines, or, if it still existed, in the appropriate Particular Register of Sasines.

Second, suppose X granted a feu-charter of lands to A, who being infeft, and so entered, disponed the lands to B, who after base infeftment disponed the lands to C, who after base infeftment disponed the lands to D, who after base infeftment disponed the lands to E, who after base infeftment disponed the lands to F; F could, on the assumption that the dispositions in favour of B, C, D, E, and F contained the ordinary executive clauses in use at the different dates, complete a title in the following ways:— Entry when disponer not entered.

TABLE B.

BY CONFIRMATION.	BY RESIGNATION.
(1) *Prior to the Infeftment Act*, 1845.	
1. Infeftment in favour of F, in virtue of precept of sasine in disposition E to F, the procedure for infeftment being as set forth in Table A (1).	1. Charter of resignation and confirmation granted by X, the superior, to F, in virtue of the procuratory in disposition E to F, the charter disponing and confirming the lands to F, and also confirming the dispositions and instruments of sasine in favour of B, C, D, and E (not of F) respectively, and thereby making valid the procuratory of resignation contained in the disposition E to F.
2. Charter of confirmation granted by X, the superior, to F, confirming to F *either* the lands and dispositions and instruments of sasine in favour of B, C, D, E, and F respectively; *or* simply these dispositions and instruments of sasine, the lands being described *narrativè*.	2. Infeftment in favour of F in virtue of the precept of sasine in charter of resignation, the procedure for infeftment being as set forth in Table A (1).

BY CONFIRMATION.	BY RESIGNATION.
(2) *Between the commencement of the Infeftment Act*, 1845, *and the commencement of the Lands Transference Act*, 1847.	
1. Infeftment in favour of F in virtue of precept of sasine in disposition E to F, the procedure for infeftment being as set forth in Table A (2). 2. No change.	1 and 2. No change.
(3) *Between the commencement of the Lands Transference Act*, 1847, *and the commencement of the Titles to Land Act*, 1858.	
1. Infeftment in favour of F in virtue of precept of sasine in disposition E to F, the procedure for infeftment being as set forth in Table A for this period. 2. Charter of confirmation in form of schedule (D) of Act of 1847, granted by X to F, confirming to F the lands and instrument of sasine in his favour.[1]	1. No change. 2. Infeftment in favour of F in virtue of the precept of sasine in charter of resignation, the procedure for infeftment being as set forth in Table A (3).
(4) *Between the commencement of the Titles to Land Act*, 1858, *and the commencement of the Titles to Land Act*, 1860.	
1. Infeftment in favour of F by recording the disposition E to F, as set forth in Table A (4). 2. *Either* a writ of confirmation, *or* a charter of confirmation granted by X to F, as set forth in Table A (4).	1. *Either* a writ of resignation in the form of schedule (F) of the Act of 1858, granted by X to F, and written on the disposition E to F; *or* a charter of resignation and confirmation granted by X to F, in the form in use prior to 1858, *i.e.*, disponing and confirming the lands to F, and confirming the dispositions and sasines in favour of B, C, D, and E respectively, with this difference, that after 1858 the charter did not require to contain a precept of sasine.

[1] After 1847 the charter of confirmation required to confirm only the lands and the instrument of sasine in favour of the person obtaining confirmation, even although there intervened between him and the last entered vassal several proprietors who were base infeft.

BY CONFIRMATION.	BY RESIGNATION.
	2. Infeftment in favour of F *in the case of a writ of resignation being granted*, by recording the disposition in favour of F, and the writ of resignation, along with a warrant of registration in favour of F in the form of schedule (A), No. 1, of the Act of 1858, in F's lifetime, either in the General Register of Sasines or in the appropriate Particular Register of Sasines; or *in the case of a charter of resignation and confirmation being granted*, by recording it, with such warrant of registration, in F's lifetime, either in the General Register of Sasines or in the appropriate Particular Register of Sasines.

(5) *Between the commencement of the Titles to Land Act*, 1860, *and the commencement of the Titles to Land Consolidation Act*, 1868.

1 and 2. No change.	1 and 2. The only change was, that in virtue of section 39 of the Act of 1860 a charter of resignation could be used in place of the charter of resignation and confirmation, and the effect of the charter of resignation after the Act of 1860 was, like the effect of the writ of resignation after 1858, to confirm all deeds necessary to be confirmed in order to complete the investiture, even although such deeds were not enumerated.

(6) *Between the commencement of the Titles to Land Consolidation Act*, 1868, *and the commencement of the Conveyancing Act*, 1874, *i.e.*, 1*st October* 1874.

1 and 2. As in Table A (6).	1 and 2. As in Table A (6).

Although it was the proper practice that the charter of resignation and confirmation should confirm the transmissions

Completion of title by both resignation and confirmation.

and sasines, excluding the disposition in favour of the person seeking entry, yet it was also held competent for a disponee, where his disposition contained an obligation to infeft him by two several manners of holding, either *a me* or *de me*, and by resignation or confirmation, or both, the one without prejudice to the other, to take base infeftment in virtue of the precept of sasine in his disposition, and then to obtain a charter of resignation and confirmation which, *inter alia*, confirmed his base infeftment, and also to take infeftment on the precept in the charter of resignation. This procedure gave the disponee a double title to the lands. He could choose which title he would use ; and the titles were not considered inconsistent with or destructive of each other. The procedure created no split between the property and the mid-superiority.[1]

Splits.

It has been shown how separate estates of property and superiority in the same land were created. If separate estates of mid-superiority and property were created and held by separate infeftments, a split was said to exist between them, even if they came to be held by the same person, until they were consolidated by the steps to be afterwards detailed.

The following is an example of how a split might be created :—

1. Feu-charter X to A.
2. Infeftment taken thereon by A.
3. Disposition A to B.
4. Base infeftment taken thereon by B.
5. Charter of resignation X to B.
6. Infeftment taken thereon by B.

Here the infeftment on the disposition vested B in the property and divested A. The procuratory of resignation in the disposition could thereafter authorise resignation of nothing but the mid-superiority, which accordingly was all that was carried by the charter of resignation ; and B, in taking infeftment on this charter, took infeftment in the mid-superiority alone. He therefore held the two estates by different titles, and a split

[1] *Campbell*, 5 Br. Sup. 809, 2 Ross' L.C. 157 ; *Stewart*, 5 S. 383, 2 Ross' L.C. 160 ; Bell's Lect. ii. 743.

had been produced. If B did not desire to create a split, the mistake he made was in taking infeftment before getting the charter of resignation, or otherwise in using the charter of resignation and taking infeftment thereon instead of simply a charter of confirmation after infeftment on the disposition in his favour.

Another example of the creation of a split is this:—

1. Feu-charter X to A.
2. Infeftment taken thereon by A.
3. Disposition A to B.
4. Infeftment taken thereon by B.
5. Disposition B to C.
6. Infeftment taken thereon by C.
7. Disposition C to D.
8. Charter of resignation X to D.
9. Infeftment taken thereon by D.
10. Infeftment taken by D on disposition C to D.

The result of this is that D is infeft in the property by his infeftments on the disposition by C, and in the mid-superiority by his infeftment on the charter of resignation. This charter proceeded on the procuratory in the disposition by A, the last entered vassel, the right to which was transmitted by the assignations to writs in the dispositions by B and C, and therefore it conveyed only the mid-superiority.

After the granting of the disposition in his favour, D might have taken these steps:—

8. Infeftment taken thereon by D.
9. Charter of resignation and confirmation X to D, confirming the dispositions and sasines in favour of B and C, and proceeding on the procuratory of resignation in the disposition by C.
10. Infeftment taken on such charter by D.

Here D's infeftment on the disposition by C has divested C of the property. Accordingly, the procuratory in the disposition by C can only authorise a charter of resignation carrying the mid-superiority; and D, in taking infeftment on the charter,

only infefts himself in the mid-superiority, and the result is a split.[1]

If it was not desired to create a split, the correct procedure was without infeftment on the disposition C to D.

8. Charter of resignation and confirmation X to D, confirming the dispositions and sasines in favour of B and C, and proceeding on the procuratory of resignation in the disposition by C.
9. Infeftment taken thereon by D.

If infeftment had been taken on the disposition C to D, a charter of confirmation should have been used confirming all the dispositions and sasines back to the disposition by A. Or if a combined charter of resignation and confirmation were used after infeftment, it should have confirmed also the disposition and sasine in favour of D.[2]

Disposition in its Present Form, and Infeftment Thereunder.

Conveyancing Act, 1874, rendered unnecessary expression of (*a*) manner of holding; (*b*) procuratory or clause of resignation.

As the Conveyancing Act, 1874, makes infeftment imply entry with the superior,[3] it is now unnecessary to express a holding either *a me* or *a me vel de me* in a disposition, or to insert a procuratory or clause of resignation. The Act of 1874 provides that a procuratory or clause of resignation in a disposition shall be held *pro non scripto*.[4] The Act of 1874 also repeals the section[5] of the Act of 1868 relating to description of lands by reference, and makes new provisions for such descriptions.[6]

In consequence of the enactments of the Conveyancing Act, 1874, the style of the disposition now in use is as follows:—

I. Narrative Clause.

I. A (*designation*), heritable proprietor of the subjects hereinafter disponed, IN CONSIDERATION of the sum of £ sterling, instantly paid to me by B (*designation*) as the price thereof, of which sum I hereby acknowledge the receipt and discharge the said B, do hereby SELL and DISPONE to the said B and his heirs and assignees whomsoever (*or it may be with a proper destination-over*), heritably and irredeemably, ALL and WHOLE (*here describe the subjects conveyed either particularly or by reference in terms of schedule* (*O*) *of the Conveyancing*

II. Dispositive Clause.

III. Term of Entry.

IV. Assignation of Writs.

[1] But see pp. 127-8 as to completion by both resignation and confirmation.

[2] See p. 127, *supra*.

[3] S. 4 (2); *Morris*, 4 R. 515.

[4] S. 26.

[5] S. 11, schedule (E).

[6] S. 61, schedule (O).

Act, 1874), together with my whole right, title, and interest, present and future, therein (*if the subjects are to be held under any burdens not already constituted, these will be here particularly inserted; and if held under burdens already constituted, these will be described either particularly or by reference in terms of schedule* (*D*) *of the Titles to Land Consolidation Act*, 1868): With entry at the term of : And I assign the writs, and have delivered the same according to inventory hereto annexed and subscribed by me as relative hereto (*or otherwise, as may be desired*): And I assign the rents: And I bind myself to free and relieve the said B and his foresaids of all feu-duties, casualties, and public burdens: And I grant warrandice: And I consent to registration hereof for preservation,—In witness whereof, etc.

V. Assignation of Rents.
VI. Obligation to relieve of burdens.
VII. Clause of Warrandice.
VIII. Consent to registration.
IX. Testing Clause.

The principal differences between this form and the form of the feu-charter are that in it the granter sells and dispones the subjects, while in the feu-charter he sells and in feu-farm dispones; and further, that in the disposition there is neither *tenendas* nor *reddendo*, both of which are still appropriate to a feu-charter.

Differences in form between a disposition and a feu-right.

What has been said of the clauses of the feu-charter applies, *mutatis mutandis*, to the corresponding clauses in the feu-disposition.

When a disponer is duly infeft, his disponee completes a feudal title to the subjects in the disposition, in the same ways as the grantee under a feu-charter completes his.[1]

How disponee completes a *title*.

[1] See p. 68, *supra*.

CHAPTER VII

DISPOSITION OF SUPERIORITY TO STRANGER OR TO VASSAL; DISPOSITION OF PROPERTY TO SUPERIOR, AND CONSOLIDATION OF SUPERIORITY AND PROPERTY; FORFEITURE AND RELINQUISHMENT OF SUPERIORITY

I. Disposition of Superiority to Stranger or to Vassal.

Rights of superior.

A RIGHT of superiority carries these rights—(*a*) to exact by the methods described satisfaction of the feu-duties[1] and other prestations[2] expressly stipulated for in the feu-right;[3] (*b*) to exercise any rights of property reserved by the feu-right, as, *e.g.*, to work minerals;[4] and (*c*) to protect the lands from injurious operations by the vassal, or by third parties, even if these be sanctioned by the vassal,[5] as well as to prevent the acquisition of servitudes over them.[6] On the other hand, a superior is bound to implement the obligations undertaken by him in the feu-right,—*e.g.*, an obligation to relieve the vassal of stipend,[7]—and is, in the absence of anything to the contrary, liable in damages if, through default attributable to him, the vassal is evicted from the feu.[8]

Liabilities of superior.

Division of superiority.

A superior may on granting a feu-right reserve power to divide the superiority without the vassal's consent; but, in the absence of such reservation, the rule is that a vassal can object to the superior's conveying the superiority, in fee[9] or liferent,[10] in portions to different parties. The reason of this rule is that the vassal is not bound to hold the property of more than one superior; for holding of two or more superiors increases the number of persons to whom the feudal services

[1] See p. 57, *supra*.
[2] See p. 48, *supra*.
[3] See pp. 48 *et seq*, *supra*.
[4] See p. 42, *supra*.
[5] *Marquis of Breadalbane*, 13 D. 647.
[6] *Ibid.*, and Stair, 2, 4, 36; Ersk. 2, 9, 4.
[7] See p. 65, *supra*.
[8] See p. 66, *supra*.
[9] *Montrose*, M. 8822; aff., 6 Pat. 805; *Maxwell*, *infra*.
[10] *Graham*, 4 S. 615.

are due, and, prior to the commencement of the Conveyancing Act, 1874, put the vassal to the expense of more than one entry.[1] But a conveyance of a fee of superiority to two or more persons jointly is not a multiplication of superiors to which a vassal can object, because such disponees have only one estate vested in them.[2] The objections to splitting the superiority can be waived by the vassal's consent or acquiescence, or barred by the negative prescription.[3]

Interjection of superiority.

Just as a vassal can object to the multiplication of superiors, so he can object to the interjection of a mid-superiority between the superiority and the property.[4] That is to say, the superior cannot feu the superiority without his vassal's consent. The reason of this is, or at least before 1874 was, that he had an interest to see that the number of superiors between himself and the Crown was not increased. But, as in the case of multiplication of superiors, the objection to interjection could be barred by reserved power in favour of the superior to creat a mid-superiority fee, and it could also be waived by the vassal's consent or acquiescence,[5] and cut off by the negative prescription, and the objection did not apply when a superior into whose hands a fee of mid-superiority had fallen by forfeiture bestowed the forfeited estate on a new vassal.[6]

Form of disposition of superiority.

The following are the clauses of a disposition of superiority since the commencement of the Conveyancing Act, 1874:— I. Narrative Clause: "*I, A B, superior of the subjects hereinafter disponed,*" *etc.* II. Dispositive Clause. III. Term of Entry. IV. Assignation of Writs. V. Assignation of Feu-duties and Casualties: "*And I assign the feu and blench duties and casualties of superiority or sums in lieu thereof due and payable from and after the said term of entry.*" VI. Obligation to free of Public Burdens. VII. Clause of Warrandice: "*And I*

[1] See *Montrose* and *Graham, supra*; and *Maxwell*, M. 8817, 15,015; Elch. No. 5, Superior and Vassal; *Sinclair*, 5 Br. Sup. 812.

[2] *Cargill*, 15 S. 408; and see *Lady Luss*, M. 15,028 (where held that where superiors are heirs-portioners, the vassal is entitled to entry from them all jointly, or from the eldest alone).

[3] Bell's Lect. ii. 754.

[4] *Douglas of Kelhead*, M. 15,012; *Archbishop of St Andrews*, M. 15,015; *Stewart*, M. 15,012; Bell's Lect. ii. 753.

[5] *Hotchkis*, 6 Dec. 1822, F.C., 2 S. 70.

[6] *Earl of Argyll*, M. 15,013; *Duke of Gordon*, M. 10,975.

grant warrandice, excepting always therefrom the feu and other rights of property of the said subjects granted by me and my predecessors and authors to the feuars and vassals thereof, without prejudice to the right of the said B to quarrel or impugn the same upon any ground in law not inferring warrandice against me and my heirs and successors." VIII. Clause of Registration. IX. Testing Clause.[1]

Form before 1874.

In the earlier forms of the disposition of superiority all the clauses necessary in the disposition of property at the same periods, but since rendered unnecessary, were required.

Disposition usually conveys lands.

In a disposition of superiority the dispositive clause usually conveys the lands; but it is now settled that the superiority or *dominium directum* of lands can be disponed *per se* without a conveyance of the lands themselves.[2] It is important, however, in order to admit of the consolidation of property and superiority by prescription, that the lands, and not merely the superiority or *dominium directum*, should be disponed.[3] When a superior has a right to the minerals of the feu, a disposition of the superiority will also carry right to such minerals, unless the disposition shows that the parties did not intend them to be included.[4]

Holding before 1874.

In dispositions of superiority prior to 1874 the manner of holding was usually expressed to be *a me*, but an alternative holding might be inserted; for if the vassal objected to a disponee's base infeftment in the superiority, the latter could at once remove the ground of the objection by obtaining confirmation of his infeftment.

Completion of disponee's title to superiority.

Titles to superiority have always been completed in the same way as titles to property.

II. Disposition of Property to Superior, and Consolidation of Superiority and Property Fees.

Essentials for superior's acquiring fee of property and consolidating it with superiority.

A superior who purchases the property from his vassal, or who succeeds to it as his vassal's heir, has to make up his title

[1] Jur. Styles, i. 99; Hendry's Styles, 96.

[2] *Gardner*, 3 D. 534; *Hamilton*, Feb. 23, 1819, F.C., 1 Ross' L.C. 22; *Hill*, 6 S. 1133; *Mackenzie*, Dec. 14, 1822, F.C.; *Williams and James*, 10 M. 362; and cf. *Park*, May 16, 1816, F.C. (overruled by *Hamilton* and *Gardner*, *supra*).

[3] Bell's Lect. ii. 755.

[4] See p. 42, *supra*.

to it just as if it were land over which he has no right of superiority; for it has been decided that the property cannot be looked upon as a mere burden on the superiority.[1] Further, consolidation does not take place *ipso jure* when the same person has made up titles to the fees of both superiority and property.[2]

Disposition of property to superior and consolidation.

Since the commencement of the Conveyancing Act, 1874, the practice has been, for a superior purchasing the *dominium utile* held of himself, to obtain from his vassal a disposition in the same form as if he were a stranger to the feu, and to take infeftment under it, and then, his titles to the property and the superiority being complete, to record a minute of consolidation in the form provided by the Act,[3] with a warrant of registration in his favour, in the appropriate Register of Sasines. The same method of consolidation is followed in practice by a vassal who acquires by purchase or succession the superiority of his lands. This method of consolidation is in terms of section 6 of the Conveyancing Act of 1874, which provides that (*a*) when a superior acquires and completes a title by infeftment to the property or mid-superiority of the lands, or (*b*) where the proprietor of the property or of the mid-superiority acquires and completes a title by infeftment to the superiority, a minute in the form of schedule C shall, when recorded in the appropriate Register of Sasines, be held to consolidate the property or the mid-superiority, as the case may be, with the superiority, all to the same effect as consolidation effected by resignation *ad perpetuam remanentiam*, duly completed according to the former law and practice.

Alternative method of consolidation.

It is thought, however, that a superior purchasing the property may make up his title to it and consolidate the two fees, even since 1874, by having inserted in the disposition in his favour a procuratory or clause of resignation *ad remanentiam*, and by taking infeftment under it. It is also thought that, after completing separate titles to the superiority and the property, the owner of them may consolidate them by

[1] *Morton*, M. 6917; Bell's Lect. ii. 773.
[2] *Bald*, M. 15,084; aff. 2 Ross' L.C. 210, 230.
[3] Schedule (C).

recording a procuratory of resignation *ad remanentiam* with a warrant of registration in his favour.

Form of disposition in favour of superior before 1874.

Before 1874, when a superior, in purchasing the property from his vassal, desired to consolidate the two fees, the disposition in his favour never required an obligation to infeft, a manner of holding, or a precept of sasine, but contained a procuratory or clause of resignation *ad remanentiam*, as opposed to *in favorem*. Indeed, a separate procuratory of resignation *ad remanentium* granted by the vassal was by itself, and, it is thought, still is, a habile form of transferring property to a superior,[1] and of consolidating it with the superiority.

Clauses of disposition to superior prior to 1845.

The clauses of a disposition of property in favour of a superior prior to the Infeftment Act, 1845, were—(1) the introductory clause; (2) dispositive clause; (3) *quæ quidem* clause; (4) obligation to resign; (5) the procuratory of resignation *ad remanentiam* appointing procurators to resign the lands in the hands of the superior "*ad perpetuam remanentiam*, to the effect that the right of property in the said lands which stood in my person be established and consolidated in the person of the said B, with his right of superiority of the same, and remain inseparable therefrom in all time coming"; (6) clause of warrandice; (7) assignation of writs and rents from a certain time; (8) clause of warrandice of that assignation; (9) obligation to free the subjects of public burdens; (10) clause of delivery of titles; (11) clause of registration; (12) testing clause.[2]

Consolidation of superiority and property.

On obtaining the disposition, the superior could, if his disponer—*i.e.*, his vassal—was entered in the property, or, after making his disponer's title public, if it happened to be base, at once infeft himself in the property, and consolidate the superiority and the property fees, by recording an instrument of resignation *ad remanentiam*, within sixty days of its date, in the General or Particular Register of Sasines applicable to the lands, the instrument being preceded by symbolical resignation of the lands. At the ceremony of resignation,[3] which did not

Ceremony of resignation.

[1] Duff, 243.
[2] Menzies, 591; Bell's Lect. ii. 777.
[3] Bell's Lect. ii. 781.

require to take place on the ground of the lands, five persons appeared—(1) a procurator on behalf of the vassal, (2) the superior or his commissioner specially authorised to receive resignation *ad remanentiam*, (3) a notary public, and (4 and 5) two witnesses. The procurator, having the disposition containing the procuratory of resignation *ad remanentiam*, resigned the lands by delivering to the superior or his commissioner a pen, which came by universal practice to be used for staff and baton (the necessary symbol).[1] The superior or his commissioner received and retained the pen, and thereafter took instruments in the hands of the notary. After this symbolical resignation an instrument of resignation *ad remanentiam* was expede, which had to set forth accurately the disposition or other deed containing the procuratory of resignation,[2] and to deduce the title of the person in whose favour it was expede, and to be recorded within sixty days of its date.[3]

Instrument of resignation.

Deduction of title.

If the proprietor of the superiority obtained a disposition of the property containing no procuratory of resignation *ad remanentiam*, he first made his title under the disposition public by resignation or confirmation, just as if the superior had been another person. He then granted a procuratory of resignation *ad remanentiam* in his own favour, on which, after symbolical delivery, he expeded an instrument of resignation *ad remanentiam*.

Consolidation without procuratory of resignation *ad remanentiam* in disposition.

Similarly, when a person had a completed title to the property, and afterwards acquired a completed title to the superiority, he consolidated the two fees by procuratory of resignation *ad remanentium* in his own favour, followed by a recorded instrument. But prior to consolidation the titles to both fees had to be fully completed, and he had to hold the property directly of himself.[4]

The Infeftment Act, 1845, made it unnecessary for the notary public to adhibit his long docquet to instruments of resignation *ad remanentium*.[5] The Act also allowed resignations

Infeftment Act, 1845.

[1] Act of Sederunt, Feb. 11, 1708. *Earl of Aberdeen*, M. 14,316; *Carnegy*, M. 14,316.

[2] *M'Millan*, 9 S. 551; and *cf. Duke of Argyll*, 11 M. 616 (question raised whether procurator had to be designed in instrument).

[3] 1669, c. 3.

[4] See *Grant*, M. 8740; Bell's Lect. ii. 783, 786.

[5] S. 8.

ad remanentiam to be accepted by the known agent of the superior for the time being as well as by himself or by one holding a formal commission for the purpose.[1]

Lands Transference Act, 1847.

The Lands Transference Act, 1847, provided that a clause of resignation in the form "*And I resign the said lands and others for new infeftment*" should, when it occurred in a disposition by a vassal to his superior, be held equivalent to a procuratory of resignation *ad remanentiam*.[2]

Titles to Land Act, 1858.

The Titles to Land Act, 1858, made symbolical resignation or an instrument of resignation *ad remanentiam* unnecessary, and made it competent to effect resignation under a procuratory of resignation or a conveyance containing a clause of resignation by recording the procuratory or conveyance with a warrant of registration thereon in the appropriate Register of Sasines, or by expeding and recording a notarial instrument.[3] Instruments of resignation were not, however, made incompetent, and a form was given for them.[4] If in this form, they might be recorded within the lifetime of the party in whose favour the resignation was made.[5] The Act also provided that a clause of resignation in any conveyance should be held to import a resignation *in favorem* only, unless specially expressed to be a resignation *ad remanentiam*, subject to this provision, that nothing contained in the Act should prevent an instrument of resignation *ad remanentiam* from being expede and recorded on a conveyance theretofore granted, and containing a clause of resignation in the form authorised by the Lands Transference Act, 1847.[6]

Titles to Land Consolidation Act, 1868.

The Titles to Land Consolidation Act, 1868, which repealed the provisions of the preceding Acts relating to consolidation, re-enacted them with slight alterations.

The Act of 1858 apparently did not require a warrant of registration to be recorded with a notarial instrument, or an instrument of resignation,[7] but the Act of 1868 requires such warrant to be written on these instruments.[8]

1 S. 8.
2 S. 3, schedule (A).
3 Schedule (B).
4 Schedule (D).
5 S. 4.
6 S. 5.
7 S. 4.
8 S. 141; and see 31 & 32 Vict., c. 64, s. .

Because of the abolition of writs by progress by the Conveyancing Act, 1874, the opinion is sometimes expressed that it is not now competent to consolidate a fee of property with a fee of superiority otherwise than by recording a minute of consolidation; but it is thought that consolidation can still be effected in any of the ways competent prior to the commencement of the Act. Conveyancing Act, 1874.

As a summary of the preceding paragraphs, it will be shown in parallel columns (1) how a superior whose title to the superiority was or is quite complete, and who bought or buys the property from an entered vassal, could before 1874, and can now, infeft himself in the property as well as consolidate the two fees; and (2) how the holder of separate titles, both being fully complete, to the superiority and the property, could before 1874, and can now, consolidate the two fees.

SUPERIOR ACQUIRING THE PROPERTY.	PROPRIETOR HAVING SEPARATE TITLES TO SUPERIORITY AND PROPERTY.
(1) *Before the commencement of the Infeftment Act*, 1845.	
1. *Either* disposition of property containing express procuratory of resignation *ad remanentiam*, *or* separate procuratory of resignation *ad remanentiam* by vassal in superior's favour.	1. Execution by proprietor, as vassal, of procuratory of resignation *ad remanentiam* in favour of himself as superior.
2. Symbolical resignation in virtue of procuratory, whether contained in disposition or separate, by staff and baton, *i.e.*, by pen, by vassal's procurator, either to the superior himself, or to his commissioner having special power to receive resignation, before notary and two witnesses.	2. Symbolical resignation in virtue of said procuratory by staff and baton, *i.e.*, by pen, by proprietor's procurator either to the proprietor himself, or to his commissioner having power to receive resignation, before notary and two witnesses.
3. Expeding and recording in the General or appropriate Particular Register of Sasines, within sixty days of its date, instrument of resignation *ad remanentiam*, signed by notary and witnesses on each page.	3. Expeding and recording in the General or appropriate Particular Register of Sasines, within sixty days of its date, instrument of resignation *ad remanentiam*, signed by notary and witnesses on each page.

Superior acquiring the Property.	Proprietor having Separate Titles to Superiority, etc.

(2) *After the commencement of the Infeftment Act,* 1845, *till the commencement of the Lands Transference Act,* 1847.

Only changes were that it was made unnecessary for the notary to append to instrument of resignation his long docquet, and that resignation might be accepted by superior's known agent as well as by himself, or by any person having a formal commission for that purpose.	Only changes were that it was made unnecessary for the notary to append to instrument of resignation his long docquet, and that resignation might be accepted by proprietor's known agent as well as by himself, or by any person having a formal commission for that purpose.

(3) *After the commencement of the Lands Transference Act,* 1847, *till the commencement of the Titles to Land Act,* 1858.

Only change, that disposition by the vassal to the superior might contain either a clause in the form, "*And I resign the said lands and others for new infeftment,*" (or) a procuratory of resignation *ad remanentiam.*	No change.

(4) *After the commencement of the Titles to Land Act,* 1858, *till the commencement of the Titles to Land Consolidation Act,* 1868.

1. Either (*a*) disposition of property containing procuratory or express clause of resignation *ad remanentiam*, (or) (*b*) separate procuratory of resignation *ad remanentiam* by vassal in superior's favour.	1. Execution by proprietor of procuratory of resignation in favour of himself.
2. Either (*a*) recording such disposition or procuratory, with a warrant of registration thereon in his favour, in the form of schedule (A) of the Act of 1858, in the General or appropriate Particular Register of Sasines; (or) (*b*) expeding and recording a notarial instrument in the form of schedule (B); (or) (*c*) expeding and re-	2. Either (*a*) recording the procuratory of resignation, with a warrant of registration thereon in his favour, in the form of schedule (A) of the Act of 1858, in the General or appropriate Particular Register of Sasines; (or) (*b*) expeding and recording a notarial instrument in the form of schedule (B); (or) (*c*) expeding and recording an

Superior acquiring the Property.	Proprietor having Separate Titles to Superiority, etc.
cording an instrument of resignation *ad remanentiam* in the form of schedule (D); (or) (*d*) after symbolical resignation expeding and recording an instrument of resignation *ad remanentiam* in the old form, with or without the long notarial docquet. An instrument in this last form had to be recorded within sixty days of its date; but the procuratory or disposition, or notarial instrument, or instrument of resignation in the form of schedule (D) could be recorded at any time within the lifetime of the party in whose favour it was recorded.	instrument of resignation *ad remanentiam* in the form of schedule (D); (or) (*d*) after symbolical resignation expeding and recording an instrument of resignation *ad remanentiam* in the old form, with or without the long notarial docquet. An instrument in this last form had to be recorded within sixty days of its date; but the procuratory, or notarial instrument, or instrument of resignation in the form of schedule (D), could be recorded at any time within the lifetime of the party in whose favour it was recorded.
Note.—If the disposition had been granted before 1858 containing a clause of resignation in the form, "*And I resign the said lands and others for new infeftment,*" an instrument of resignation in one of the two forms mentioned had to be expede and recorded, the registration of the disposition itself not affecting consolidation.	

(5) *After the commencement of the Titles to Land Consolidation Act,* 1868, *till the commencement of the Conveyancing Act,* 1874.

1. Either (*a*) disposition of property containing procuratory or express clause of resignation *ad remanentiam*, (or) (*b*) separate procuratory of resignation *ad remanentiam* by vassal in superior's favour.	1. Execution by proprietor of procuratory of resignation in favour of himself.
2 Either (*a*) recording such disposition or procuratory, with a warrant of registration thereon, in the form No. 1 of schedule (H) annexed to the Act of 1868, in the appropriate Register of Sasines, *i.e.*, in the	2. Either (*a*) recording such procuratory, with a warrant of registration in the form No. 1 of schedule (H) annexed to the Act of 1868, in the appropriate Register of Sasines, *i.e.*, in the General or, if it still

Superior acquiring the Property.	Proprietor having Separate Titles to Superiority, etc.
General or, if it still existed, the appropriate Particular Register of Sasines; or (*b*) by expeding and recording a notarial instrument in the form of schedule (J), with a warrant of registration thereon in the form No. 1 of schedule (H); or (*c*) expeding and recording an instrument of resignation *ad remanentiam* in the form of schedule (K), with a warrant of registration in the form No. 1 of schedule (H); or (*d*) after symbolical delivery expeding and recording an instrument of resignation *ad remanentiam* in the old form, with or without the long notarial docquet,—the recording in the first three cases being at any time within the lifetime of the superior. *Note.*—The Act of 1868 provided that nothing in it should prevent an instrument of resignation *ad remanentiam* being expede and recorded on a conveyance granted prior to 1st October 1858, and containing a clause of resignation in the form authorised by the Lands Transference Act, 1847. Such instrument might be in the form of schedule (K), or in the old form, with or without the long notarial docquet.	existed, the appropriate Particular Register of Sasines; or (*b*) expeding and recording a notarial instrument in the form of schedule (J), with a warrant of registration in the form of No. 1 of schedule (H); or (*c*) expeding and recording an instrument of resignation *ad remanentiam* in the form of schedule (K), with a warrant of registration in the form of No. 1 of schedule (H); or (*d*) after symbolical delivery expeding and recording an instrument of resignation *ad remanentiam* in the old form, with or without the long notarial docquet,—the recording in the first three cases being at any time within the lifetime of the superior.

(6) *After the commencement of the Conveyancing Act*, 1874.

As before the commencement of the Act. *Note.*—Since 1874 a superior acquiring the property will generally proceed by completing his title to the property in the ordinary way, and thereafter consolidating by minute as in opposite column.	1. As before the commencement of the Act; *or otherwise*— 2. Executing and recording a minute of consolidation in the form of schedule (C) of the Act, with a warrant of registration in the form of No. 1 of schedule (H) of the Act of 1868, in the appropriate division of the General Register of Sasines.

Consolidation can be effected not only by the modes above set forth, but also by prescription. If the superiority infeftment contains the lands, and if the lands as well as the superiority are possessed on such infeftment for the prescriptive period, consolidation of the two fees will be effected by prescription.[1] But where possession of a *dominium utile* for more than forty years, following on a disposition and sasine, had been held by a series of apparent heirs uninfeft, who were also the heirs of entail in the superiority, it was held that there was no consolidation, on these principles: (1) that possession for forty years, following upon a disposition and sasine, will make a good prescriptive title, although part of the forty years' possession has been by an apparent heir or heirs uninfeft; but (2) that where a person has two titles to the same lands, to either of which his prescriptive possession may be ascribed, the one being unlimited and the other limited, as by an entail, the presumption is in favour of freedom, and he is accordingly entitled to ascribe the possession to the fee-simple title, and to hold the lands in fee-simple, unless the nature of the possession is not consistent with the title to which he seeks to ascribe it.[2]

Consolidation by prescription.

When consolidation of a fee of superiority and a fee of property takes place, the destination of the property is merged in that of the superiority, even though prior to consolidation the property stood destined to a different series of heirs.[3] The practice was and is, in conveying the property to the superior, to destine the property in the way the superiority stood or stands destined. If the *dominium plenum* is held in fee-simple, the proprietor of it can again separate the property from the superiority; and, even when a fee of superiority is entailed, and the heir of entail in possession acquires the fee of property, and consolidates the two fees, the fee of property, notwithstanding the consolidation, can be reissued by the heir of entail who acquired it,[4] or by a succeeding heir

Effect of consolidation.

Fee-simple estates.

Entailed estates.

[1] *Harvey*, 1 S. 277, 3 Ross' L.C. 576, and cases quoted in H.R. 422.

[2] *Earl of Glasgow*, 14 R. 419; see further on double titles, *supra*.

[3] *Park's Curator*, 8 M. 671; *Pattison*, 4 M. 1104; aff. 6 M. (H.L.) 147.

[4] *Heron*, 1 Pat. 98.

of entail,[1] unless the consolidation was effected by prescription, in which case the *dominium utile* is brought under the fetters of the entail.[2]

[1] *Galbraith*, Jan. 14, 1814, F.C.; Bell's Lect. ii. 779; and see *Duke of Roxburghe*, 1 W. & S. 41 (where held that an heir of entail, redeeming a wadset on the entailed lands, and taking an unconditional discharge and renunciation, had extinguished it so as to prevent his conveying it to another).

[2] *Lord Elibank*, 12 S. 74, 3 Ross' L.C. 534. On forfeiture and relinquishment of superiority, see H.R. 425.

CHAPTER VIII

ASSIGNATIONS OF PERSONAL TITLES TO LAND UNDER UNFEUDALISED CONVEYANCES; OF PERSONAL RIGHTS TO LAND IN THE SENSE OF SECTION 9 OF CONVEYANCING ACT, 1874; AND OF *JURA CREDITI* TO LAND

Distinction between personal title and personal right.

IT is now necessary to deal with (1) a personal title; (2) a personal right in the sense of section 9 of the Conveyancing Act, 1874; and (3) a *jus crediti* to lands. By a personal title is meant simply a title on which infeftment has not been taken—as, for example, an unrecorded conveyance. But a person may have a personal right to land depending not on any writings, but on his succession to the last owner. This is the kind of personal right dealt with by section 9 of the Conveyancing Act of 1874. Lastly, a person may have the right to call on some one to convey lands to him—as, for example, a beneficiary may have a right to call on a trustee to grant a conveyance of lands which a truster has ordained to be conveyed to him. This right is usually called a *jus crediti*. If a personal title, or a personal right in the sense of the Act of 1874, is assigned separately to two or more persons, the assignee who first takes infeftment acquires a real right to the lands to the exclusion of the other assignee or assignees; but if a *jus crediti* is so assigned, the assignee who first duly intimates his assignation is preferred to the others.[1]

Jus crediti.

I. TRANSFERENCE OF PERSONAL TITLE TO LANDS UNDER UNFEUDALISED CONVEYANCES.

Disposition and assignation.

Although before 1845 a person having a personal title to lands could transfer such right by a simple assignation[2] of

[1] See p. 162, *infra*.

[2] *Renton*, 16 S. 134; 1 Bell's App. 129, aff. 2 Bell's App. 214, 2 Ross' L.C. 435; *Livingstone*, M. 15,418, 2 Ross' L.C. 425; *Cockburn*, 14 S. 889, 2 Ross' L.C. 460.

the unexecuted executive clauses (*i.e.*, the procuratory of resignation and precept of sasine) which were contained in his title, and in respect of which he could have feudalised it, yet the usual mode of transferring such personal right was then, and continued until 1858 to be, by a deed called a disposition and assignation, which was similar in its terms to the ordinary disposition then in use, with these exceptions—that it omitted the procuratory of resignation and the precept of sasine, and contained an addition to the ordinary clause of assignation of writs specially assigning the disposition containing the open or unexecuted procuratory of resignation and precept of sasine.

Differences from disposition.

Completion of assignee's title.

The grantee under the disposition and assignation could use the procuratory or precept and make up a title either by confirmation or by resignation.

Lands Transference Act, 1847.

As the Lands Transference Act of 1847 declared that a clause of assignation to writs in the form "And I assign the writs" should import an unconditional assignation, *inter alia*, to all open procuratories and precepts to which the disponer had right,[1] it was deemed unnecessary, after the Act came into force, to insert in the clause of assignation of writs any special assignation of the disposition in favour of the disponer or of the unexecuted executive clauses therein.

Titles to Land Act, 1858.

By the Titles to Land Act, 1858, it was made competent for any party in right of an unrecorded "conveyance"[2] to assign the conveyance by assignation written either on the conveyance assigned or apart from it, and for the assignee to take infeftment (*a*) by recording the conveyance, with a warrant of registration thereon, along with the assignation (or assignations, if there happened to be successive assignations) separate from or written on the conveyance.[3] The Act made it also competent for the assignee to take infeftment (*b*) by recording the conveyance, with a warrant of registration, along with a notarial instrument; or (*c*), where it was not desired to record the whole of the conveyance, by recording simply a notarial instrument.[4] The provisions of this Act — which were extended to the

[1] S. 3.

[2] This term included original charters, dispositions, etc. See s. 36.

[3] S. 13 and schedules there referred to.

[4] S. 14 and schedules there referred to

transfer of unrecorded conveyances of subjects held burgage by the Titles to Land Act, 1860[1]—did not, however, abolish the use of the disposition and assignation.

Titles to Land Consolidation Act, 1868.

The Titles to Land Consolidation Act, 1868, whilst repealing the Titles to Land Act, 1858, made it competent to any person having right to an unrecorded "deed or conveyance,"[2] whether originally granted in favour of himself or of another person, to assign the deed or conveyance, either (*a*) by granting an assignation written apart from the unrecorded conveyance, or (*b*) by granting an assignation written on the deed or conveyance itself. The forms of such assignations are provided by the Act and set forth the deed or conveyance, and the title or series of titles, if any, by which the cedent acquired right to the same, and the nature of the right assigned.[3]

Completion of assignee's title.

If an assignation not written on the conveyance is used, the assignation (or, in the event of there being more than one, the successive assignations) may be recorded in the appropriate Register of Sasines along with the deed assigned, the assigned deed having a warrant of registration[4] written thereon and the assignation or assignations being docqueted with reference to the warrant of registration. If, on the other hand, an assignation is written on the conveyance, the deed or conveyance assigned, with the assignation or assignations written on it, may, along with a warrant of registration[5] written on the deed assigned, be recorded in the appropriate Register of Sasines. Whilst the Acts of 1858 and 1860 contemplated the use of a docquet in the case of assignations written apart from the deed assigned, they did not specially declare such docquets necessary. The Act of 1868, however, declared that, where such docquets had not been added in the case of infeftments before the commencement of the Act, such infeftments should nevertheless be effectual.[6]

An assignee of an unrecorded conveyance is authorised by

[1] Ss. 9 and 10.

[2] For what the terms "deed" and "conveyance" include, see s. 3. They include all charters and dispositions, whether containing a warrant or precept of sasine or not, whether *inter vivos* or *mortis causa*, and whether absolute or in trust.

[3] S. 22.

[4] Schedule (H), No. 2.

[5] Schedule (H), No. 1.

[6] S. 22.

the Act of 1868 to take infeftment, not only by the modes set forth in the preceding paragraph, but also[1] by (*a*) recording the deed or conveyance assigned, with a warrant of registration,[2] along with a notarial instrument,[3] docqueted with reference to the warrant of registration; or (*b*), where it is not desired to record the whole of the deed or conveyance assigned, by simply expeding and recording a notarial instrument.[4]

Disposition treated as an assignation.

If a person has a right to an unrecorded conveyance, and, instead of granting an assignation or a disposition and assignation to his assignee, grants a disposition in the same form as if he were infeft, the disposition is now, and always has been, treated merely as an assignation to the unrecorded conveyance.

Summary.

In order to sum up the preceding pages, it will be shown, in tabular form, how a personal title to lands was assigned, and how the assignee completed his title to the lands. Suppose that A, an entered vassal of X, granted a disposition (containing all the usual clauses) to B, and that B, without taking infeftment, desired to transfer his right to the lands to C, the steps necessary to assign the personal title to C, and to complete a feudal title to the lands in his person, would be as set forth in the following table as at the dates therein mentioned.

ENTRY BY CONFIRMATION.	ENTRY BY RESIGNATION.
(1) *Before the Infeftment Act*, 1845.	
1. Either (*a*) disposition and assignation, or (*b*) simple assignation, or (*c*) disposition in ordinary terms from B to C.	1. Either (*a*) disposition and assignation, or (*b*) simple assignation, or (*c*) disposition in ordinary terms from B to C.
2. Infeftment by expeding, after symbolical delivery, an instrument of sasine in favour of C on precept of sasine contained in disposition A to B and assigned to C, and recording it within sixty days of its date in the appropriate Register of Sasines.	2. Charter of resignation from X to C in virtue of procuratory of resignation contained in disposition A to B and assigned to C.
3. Charter of confirmation from X, confirming lands and disposition A to B, deed B to C, and instrument of sasine in C's favour.	3. Infeftment by expeding, after symbolical delivery, instrument of sasine in favour of C on precept of sasine in charter of resignation, and recording it within sixty days of its date in the appropriate Register of Sasines.

[1] S. 23.
[2] Schedule (H), No. 2.
[3] Schedule (N).
[4] Schedule (J).

ENTRY BY CONFIRMATION.	ENTRY BY RESIGNATION.

(2) *After the Infeftment Act*, 1845, *till the commencement of the Lands Transference Act*, 1847.

As above, subject to this explanation, that in taking infeftment no symbolical delivery was necessary, and that the instrument of sasine, if in the form authorised by the Act of 1845, could be recorded during C's lifetime.[1]

(3) *After the Lands Transference Act*, 1847, *till the commencement of the Titles to Land Act*, 1858.

As between 1845 and 1847, with this difference, that the charter of confirmation required only to confirm lands and instrument of sasine in favour of C.[2]	As between 1845 and 1847.

(4) *After the commencement of the Titles to Land Act*, 1858, *till the commencement of the Titles to Land Consolidation Act*, 1868.

1. Assignation B to C in the form of schedule (I), No. 1, written separate from the disposition A to B.[3]	1. Assignation B to C in the form of schedule (I), No. 1, written separate from the disposition A to B.[3]
2. Infeftment in favour of C either (*a*) by recording disposition A to B with a warrant of registration thereon in favour of C in the form of schedule (A), No. 2, along with the assignation B to C, docqueted with reference to the warrant of registration ;[4] or (*b*) by expeding a notarial instrument in the form of schedule (K) in favour of C, and recording the disposition A to B, with a warrant of registration in the form of schedule (A), No. 2, in favour of C, and the notarial instrument docqueted with reference to the warrant of registration ;[5] or (*c*) by expeding a notarial	2. Charter of resignation X to C, in virtue of procuratory or clause of resignation in disposition A to B.[6] 3. Infeftment in favour of C either (*a*) by recording the charter of resignation, with a warrant of registration in the form of schedule (A), No. 1 ;[7] or (but only if the charter conveyed separate lands or separate interests in the same lands) (*b*) by expeding and recording a notarial instrument in the form of schedule (B) ;[8] or (but only if the charter of resignation contained a precept of sasine) (*c*) by expeding and recording an instrument of

[1] Ss. 1 and 3.
[2] 10 & 11 Vict., c. 48, s. 7.
[3] 21 & 22 Vict., c. 76, s. 13.
[4] 21 & 22 Vict., c. 76, s. 13.
[5] S. 14.
[6] See s. 20 and s. 10.
[7] Ss. 1 and 36.
[8] Ss. 2 and 36.

ENTRY BY CONFIRMATION.

instrument in favour of C in the form of schedule (B) and recording it;[1] or (but only if the disposition A to B contained a precept of sasine) (*d*) by expeding and recording an instrument of sasine in favour of C in the form of schedule (B) of the Act of 1845, whether the precept was in the form authorised by the Act of 1845 or in the old form;[2] or (*e*) after symbolical delivery by expeding and recording an instrument of sasine in favour of C in the old form, in the event of the precept being in the old form,[3] the recording in each case being in the appropriate Register of Sasines at any time within the lifetime of C, except where an instrument of sasine in the old form was used, such instrument having to be recorded within sixty days of its date.

3. (1) Writ of confirmation in the form of schedule (E), and written (*a*) on the disposition A to B when the disposition was recorded with or without notarial instrument; or (in cases where disposition was not recorded) (*b*) on the recorded instrument, whether in the form of schedule (B) of the Act of 1858 or of schedule (B) of the Act of 1845, or in the old form;[4] or (2) separate charter of confirmation X to C.[5]

OR,

1. Assignation B to C, in the form of schedule (I), No. 2, written on the disposition A to B.[6]

[1] S. 14.
[2] S. 20, and 8 & 9 Vict., c. 35, s. 1.
[3] See p. 27, *supra*.
[4] S. 7.
[5] S. 20.

ENTRY BY RESIGNATION.

sasine in the form of schedule (B) of the Act of 1845, whether the precept was in the form authorised by the Act of 1845[7] or in the old form; or (*d*) after symbolical delivery, by expeding and recording, within sixty days of its date, an instrument of sasine in the old form in the event of the precept being in the old form;[3]

OR,

1. Assignation B to C in the form of schedule (I), No. 1, written separate from the disposition A to B.[8]
2. Writ of resignation X to C, after the form of schedule (F), in virtue of procuratory or clause of resignation in disposition, the writ being written on disposition A to B, and setting forth the assignation B to C by which C acquired right to the procuratory or clause of resignation in the disposition.[9]
3. Infeftment in favour of C by recording disposition and writ of resignation, with a warrant of registration written thereon in the form of schedule (A), No. 1.[9]

OR,

1. Assignation B to C, in the form of schedule (I), No. 2, written on the disposition A to B.[6]

[6] S. 13.
[7] S. 1.
[8] S. 13.
[9] S. 9.

ENTRY BY CONFIRMATION.

2. Infeftment in favour of C, either (*a*) by recording the disposition A to B along with the assignation B to C, with a warrant of registration, in the form of schedule (A), No. 1, in favour of C;[1] or (*b*) by expeding a notarial instrument in the form of schedule (K) in favour of C, and recording the disposition A to B, with a warrant of registration in the form of schedule (A), No. 2, and the notarial instrument docqueted with reference to the warrant of registration;[2] or (*c*) by expeding and recording a notarial instrument in favour of C in the form of schedule (B);[3] or (but only if the disposition A to B contained a precept of sasine) (*d*) by expeding and recording an instrument of sasine in favour of C in the form of schedule (B) of the Act of 1845, whether the precept was in the form authorised by the Act of 1845 or in the old form;[3] or (*e*), after symbolical delivery, by expeding and recording, within sixty days of its date, an instrument of sasine in favour of C in the old form, in the event of the precept being in the old form.[4]

3. (1) Writ of confirmation X to C in the form of schedule (E), written (*a*) on the recorded disposition A to B, when the disposition was recorded with or without a notarial instrument; or (in cases where the disposition was not recorded) (*b*) on the recorded instrument, whether in the form of schedule (B) of

ENTRY BY RESIGNATION.

2. Charter of resignation X to C in virtue of procuratory or clause of resignation contained in disposition A to B, and to which C acquired right under assignation in his favour.[5]

3. Infeftment in favour of C either (*a*) by recording the charter of resignation, with a warrant of registration in the form of schedule (A), No. 1;[6] or (but only if the charter of resignation conveyed separate lands, or separate interests in the same lands) (*b*) by expeding and recording a notarial instrument in the form of schedule (B);[7] or (but only if the charter of resignation contained a precept of sasine) (*c*) by expeding and recording an instrument of sasine in the form of schedule (B) of the Act of 1845, whether the precept was in the form authorised by that Act or in the old form;[8] or (*d*), after symbolical delivery, by expeding and recording, within sixty days of its date, an instrument of sasine in the old form in the event of the precept being in the old form.[9]

OR,

1. Assignation B to C in the form of schedule (I), No. 2, written on the disposition A to B.[9]

2. Writ of resignation X to C in the form of schedule (F), in virtue of the procuratory or clause of resignation contained in disposition A to B, the writ being written on the disposition A to

1 S. 13.
2 S. 14.
3 S. 20, and 8 & 9 Vict., c. 35, s. 1.
4 See p. 27, *supra*.
5 S. 20.
6 Ss. 1 and 36.
7 Ss. 2 and 36.
8 S. 1, and 21 & 22 Vict., c. 76, s. 20.
9 S. 13.

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the Act of 1858, or of schedule (B) of the Act of 1845, or in the old form;[1] or (2) separate charter of confirmation X to C.[2]

OR,

1. Either (*a*) disposition and assignation, or (*b*) simple assignation not in statutory form, or (*c*) disposition in ordinary terms from B to C.
2. Infeftment in favour of C either (*a*) by expeding a notarial instrument in the form of schedule (K) in favour of C, and recording the disposition A to B with a warrant of registration in the form of schedule (A), No. 2, and the notarial instrument docqueted with reference to the warrant of registration;[3] or (*b*) by expeding and recording a notarial instrument in the form of schedule (B) in favour of C;[3] or (but only if the disposition A to B contained a precept of sasine) (*c*) by expeding and recording an instrument of sasine in the form given in schedule (B) of the Act of 1845 in favour of C, whether the precept was in the form authorised by the Act of 1845 or in the old form;[4] or (*d*), after symbolical delivery, by expeding and recording, with-

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B, and setting forth assignation B to C by which C acquired right to procuratory or clause of resignation in the disposition.[5]

3. Infeftment in favour of C by recording disposition A to B, and writ of resignation with warrant of registration in favour of C in the form of schedule (A), No. 1.[5]

OR,

1. Either (*a*) disposition and assignation, or (*b*) simple assignation not in statutory form, or (*c*) disposition in ordinary terms from B to C.
2. Charter of resignation X to C in virtue of procuratory or clause of resignation contained in disposition A to B, and to which C acquired right under deed in his favour.
3. Infeftment in favour of C either (*a*) by recording the charter of resignation with a warrant of registration in the form of schedule (A), No. 1;[6] or (but only if the charter of resignation conveyed separate lands or separate interests in the same lands) (*b*) by expeding and recording a notarial instrument in the form of schedule (B);[7] or (but only if the charter of resignation contained a precept of sasine) (*c*) by expeding and recording an instrument of sasine in the form of schedule (B) of the Act of 1845, whether the precept was in the form authorised by that Act or in the old

[1] S. 7.
[2] S. 20.
[3] 21 & 22 Vict., c. 76, s. 14.
[4] S. 1, and 21 & 22 Vict., c. 76, s. 20.
[5] S. 9.
[6] Ss. 1 and 36.
[7] S. 2.

ENTRY BY CONFIRMATION.	ENTRY BY RESIGNATION.
in sixty days of its date, an instrument of sasine in the old form in favour of C, in the event of the precept of sasine being in the old form.[1]	form ;[5] or (*d*), after symbolical delivery, by expeding and recording, within sixty days of its date, an instrument of sasine in the old form, in the event of the precept being in the old form.[1]
3. (1) Writ of confirmation X to C in the form of schedule (E), written on (*a*) the disposition A to B when the disposition was recorded ; or (in cases where the disposition was not recorded) (*b*) on the recorded instrument whether in the form of schedule (B) or schedule (B) of the Act of 1845, or in the old form ;[2] or (2) separate charter of confirmation X to C.[3]	Or, 1. Either (*a*) disposition and assignation, or (*b*) simple assignation not in statutory form, or (*c*) disposition in ordinary terms, B to C. 2. Writ of resignation X to C in the form of schedule (F), in virtue of the procuratory or clause of resignation contained in the disposition, the writ being written on the disposition A to B, and setting forth the assignation A to B by which C acquired right to the procuratory or clause of resignation in the disposition A to B.[6] 3. Infeftment in favour of C by recording the disposition A to B, and the writ of resignation, with warrant of registration thereon in favour of C, in the form of schedule (A), No. 1.[6]

(5) *After the commencement of the Titles to Land Consolidation Act*, 1868, *till the commencement of the Conveyancing Act*, 1874.

1. Assignation B to C in the form of schedule (M), No. 1, written apart from the disposition A to B.[4]	1. Assignation B to C in the form of schedule (M), No. 1, written apart from the disposition A to B.[4]
2. Infeftment in favour of C, either (*a*) by recording disposition A to B, with a warrant of registration thereon in	2. Charter of resignation X to C, in virtue of procuratory or clause of resignation contained in disposition A to B, and to

[1] See p. 27, *supra*.
[2] S. 7.
[3] S. 20.
[4] 31 & 32 Vict., c. 101, s. 22.
[5] S. 1, and 21 & 22 Vict., c. 76, s. 20.
[6] S. 9.

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favour of C in the form of schedule (H), No. 2, along with the assignation B to C docqueted with reference to the warrant of registration;[1] or (*b*) by expeding a notarial instrument in the form of schedule (N) in favour of C, and recording the disposition A to B, with a warrant of registration in favour of C in the form of schedule (H), No. 2, and the notarial instrument docqueted with reference to warrant of registration;[2] or (*c*) by expeding and recording a notarial instrument in favour of C in the form of schedule (J), with a warrant of registration in the form of schedule (H), No. 1;[2] or (but only if the disposition A to B contained a precept of sasine) (*d*) by expeding and recording an instrument of sasine in favour of C, in the form of schedule (B) of the Act of 1845, with a warrant of registration in the form of schedule (H), No. 1, whether the precept was in the form authorised by the Act of 1845 or in the old form;[3] or (*e*), after symbolical delivery, by expeding and recording an instrument of sasine in favour of C in the old form, with a warrant of registration in the form of schedule (H), No. 1, in the event of the precept being in the old form; the recording in each case being in the appropriate Register of Sasines at any time within the

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which C acquired right under assignation in his favour in the form of schedule (V), No. 4,[4] or in the form previously in use.[5]

3. Infeftment in favour of C either (*a*) by recording the charter of resignation, with a warrant of registration in the form of schedule (H), No. 1;[6] or (*b*) (whether or not the charter conveyed separate lands or separate interests in the same lands) by expeding and recording a notarial instrument in the form of schedule (J) of the Act of 1868;[7] or (but only if the charter of resignation contained a precept of sasine) (*c*) by expeding and recording an instrument of sasine in the form of schedule (B) of the Act of 1845, whether the precept was in the form authorised by the Act of 1845 or in the old form;[3] or (*d*), after symbolical delivery, by expeding and recording, within sixty days of its date, an instrument of sasine in favour of C in the old form, in the event of the precept being in the old form.

(OR,

1. Assignation B to C in the form of schedule (M), No. 1, written apart from the disposition A to B.[8]
2. Writ of resignation X to C in the form of schedule (V), No. 3, in virtue of the procuratory or clause of resignation in the disposition, the writ being

[1] 31 & 32 Vict., c. 101, s. 22.
[2] S. 23.
[3] S. 1, and 31 & 32 Vict., c. 101, ss. 163 and 141.
[4] S. 99.
[5] S. 163.
[6] S. 15.
[7] S. 17.
[8] S. 22.

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lifetime of C, except where an instrument of sasine in the old form was used, such instrument having to be recorded within sixty days of its date.

3. (1) Writ of confirmation X to C in the form of schedule (V), No. 1, written on (*a*) the recorded disposition A to B when the disposition was recorded, with or without a notarial instrument; or (in cases where the disposition was not recorded) (*b*) on the recorded instrument, whether in the form of schedule (J), or of schedule (B) of the Act of 1845, or in the old form;[1] or (2) separate charter of confirmation in the form of schedule (V), No. 2,[1] or in the form in use prior to the Act of 1847.[2]

OR,

1. Assignation B to C in the form of schedule (M), No. 2, written on the disposition A to B.[3]
2. Infeftment in favour of C, either (*a*) by recording disposition A to B and assignation B to C, with warrant of registration in the form of schedule (H), No. 1;[3] or (*b*) by expeding notarial instrument in the form of schedule (N) in favour of C, and recording the disposition A to B, with a warrant of registration in the form of schedule (H), No. 2, in favour of C, and the notarial instrument docqueted with reference to the warrant of registration;[4] or (*c*) by expeding and recording a notarial instrument in favour

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written on the disposition A to B, and setting forth the assignation B to C by which C acquired right to the procuratory or clause of resignation in the disposition.[5]

3. Infeftment in favour of C by recording the disposition A to B and writ of resignation written thereon, with warrant of registration in the form of schedule (H), No. 1.[5]

OR,

1. Assignation B to C in the form of schedule (M), No. 2, written on the disposition A to B.[3]
2. Charter of resignation X to C, in virtue of procuratory or clause of resignation contained in disposition A to B, and to which C acquired right under assignation in his favour, in the form of schedule (V), No. 4,[5] or in the form previously in use.[6]
3. Infeftment in favour of C, either (*a*) by recording the charter of resignation with a warrant of registration in the form of schedule (H), No. 1;[7] or (*b*) whether or not the charter conveyed separate lands or separate interests in the same lands) by expeding and re-

1 S. 98.
2 S. 163; 10 & 11 Vict., c. 48, s. 7, schedule (D).
3 S. 22.
4 S. 23.
5 S. 99.
6 S. 163.
7 Ss. 15, 3.

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of C in the form of schedule (J), with a warrant of registration in the form of schedule (H), No. 1;[1] or (but only if the disposition A to B contained a precept of sasine) (*d*) by expeding and recording an instrument of sasine in favour of C in the form of schedule (B) of the Act of 1845, with warrant of registration in the form of schedule (H), No. 1;[2] or (*e*), after symbolical delivery, by expeding and recording, within sixty days of its date, an instrument of sasine in favour of C in the old form, with a warrant of registration in the form of schedule (H), No. 1, in the event of the precept being in the old form.[3]

3. (1) Writ of confirmation X to C in the form of schedule (V), No. 1, written (*a*) on the recorded disposition A to B, when the disposition was recorded with or without a notarial instrument; or (in cases where the disposition was not recorded) (*b*) on the recorded instrument, whether in the form of schedule (J) or of schedule (B) of the Act of 1845, or in the old form;[4] or (2) separate charter of confirmation in the form of schedule (V), No. 2,[4] of the Act of 1868, or in the form in use prior to the Act of 1847.[5]

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cording a notarial instrument in the form of schedule (J);[6] or (but only if the charter of resignation contained a precept of sasine) (*c*) by expeding and recording an instrument of sasine in the form of schedule (B) of the Act of 1845, whether the precept was in the form authorised by the Act of 1845 or in the old form;[2] or (*d*), after symbolical delivery, by expeding and recording, within sixty days of its date, an instrument of sasine in favour of C in the old form,[7] the instrument in each case being recorded with a warrant of registration in the form of schedule (H), No. 1.[8]

OR,

1. Assignation B to C in the form of schedule (M), No. 2, written on the disposition A to B.[9]
2. Writ of resignation X to C in the form of schedule (V), No. 3, in virtue of the procuratory or clause of resignation contained in the disposition A to B, the writ being written on the disposition, and setting forth the assignation B to C, by which C acquired right to the procuratory or clause of resignation in the disposition.[10]
3. Infeftment in favour of C by recording disposition A to B, and writ of resignation written thereon, with warrant of registration in the form of schedule (H), No. 1.[10]

[1] S. 23.
[2] S. 1, and 31 & 32 Vict., c. 101, ss. 163 and 141.
[3] See p. 27, *supra*.
[4] S. 98.
[5] S. 163, and see 10 & 11 Vict., c. 48, s. 7, schedule (D).
[6] S. 17.
[7] See p. 27, *supra*.
[8] S. 141.
[9] S. 22.
[10] S. 99.

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OR,

1. Either (*a*) disposition and assignation; or (*b*) simple assignation not in statutory form; or (*c*) disposition in ordinary terms, B to C.
2. Infeftment in favour of C, either (*a*) by expeding a notarial instrument in the form of schedule (N) in favour of C, and recording the disposition A to B, with a warrant of registration in the form of schedule (H), No. 2, and the notarial instrument docqueted with reference to the warrant of registration;[1] or (*b*) by expeding a notarial instrument in favour of C in the form of schedule (J), and recording it with a warrant of registration in the form of schedule (H), No. 1;[1] or (but only if the disposition A to B contained a precept of sasine) (*c*) by expeding and recording an instrument of sasine in favour of C in the form of schedule (B) of the Act of 1845, whether the precept was in the form authorised by the Act of 1845 or in the old form;[2] or (*d*), after symbolical delivery, by expeding and recording within sixty days of its date an instrument of sasine in favour of C in the old form, with a warrant of registration in the form of schedule (H), No. 1, in the event of the precept of sasine being in the old form.[3]

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OR,

1. Either (*a*) disposition and assignation; or (*b*) simple assignation not in statutory form; or (*c*) disposition and assignation in ordinary terms, B to C.
2. Charter of resignation X to C, in virtue of procuratory or clause of resignation contained in disposition A to B, and to which C acquired right under assignation in his favour in the form of schedule (V), No. 4,[4] or in the form previously in use.[5]
3. Infeftment in favour of C, either (*a*) by recording the charter of resignation, with a warrant of registration in the form of schedule (H), No. 1;[6] or (*b*) (whether or not the charter conveyed separate lands or separate interests in the same lands) by expeding and recording a notarial instrument in the form of schedule (J);[7] or (but only if the charter contained a precept of sasine) (*c*) by expeding and recording an instrument of sasine in favour of C in the form of schedule (B) of the Act of 1845, whether the precept was in the form authorised by the Act of 1845 or in the old form;[8] or (*d*), after symbolical delivery, by expeding and recording, within sixty days of its date, an instrument of sasine in favour of C in the old form, in the event of the precept of sasine being in the old form,[9] the instrument in each case

1 S. 23.
2 S. 163, and 8 & 9 Vict., c. 35, s. 1.
3 S. 141, and see p. 27, *supra*.
4 S. 99.
5 S. 163.
6 S. 15.
7 S. 17.
8 S. 163, and 8 & 9 Vict., c. 35, s. 1.
9 See p. 27, *supra*.

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3. (1) Writ of confirmation X to C in the form of schedule (V), No. 1, written (*a*) on the disposition A to B when the disposition was recorded; or (in cases where the disposition was not recorded) (*b*) on the recorded instrument, whether in the form of schedule (J), or of schedule (B) of the Act of 1845 or in the old form;[1] or (*c*) separate charter of confirmation in the form of schedule (V), No. 2, or in the form in use prior to the Act of 1847.[1]

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being recorded with a warrant of registration in the form of schedule (H), No. 1.[2]

OR,

1. Either (*a*) disposition and assignation; or (*b*) simple assignation not in statutory form; or (*c*) disposition and assignation in ordinary terms B to C.
2. Writ of resignation X to C, in the form of schedule (V), No. 3, of the Act of 1868, in virtue of the procuratory or clause of resignation contained in the disposition A to B, the writ being written on the disposition, and setting forth the assignation B to C, by which C acquired right to the procuratory or clause of resignation in the disposition.[3]
3. Infeftment in favour of C, by recording disposition A to B, and writ of resignation written thereon, with warrant of registration in the form of schedule (H), No. 1.[3]

(6) *Since the commencement of the Conveyancing Act*, 1874.

1. Assignation B to C in the form of schedule (M), No. 1, of the Act of 1868, written apart from the disposition A to B.[4]
2. Infeftment in favour of C, either (*a*) by recording disposition A to B, with a warrant of registration thereon in favour of C in the form of schedule (H), No. 2, along with the assignation B to C, docqueted with reference to the warrant of registration;[4] or (*b*) by expeding a notarial instrument in the form of schedule (N) of the Act of 1868 in favour of C, and recording the disposition A to B, with a warrant of registration in the form of schedule (H), No. 2, of the Act of 1868, in favour of C, and the notarial instrument docqueted with reference to the warrant of registration;[5] or (*c*) by expeding and recording a notarial instrument in the form of schedule (J) of the Act of 1868, with a warrant of registration in

[1] S. 98.
[2] S. 141.
[3] S. 99.
[4] 31 & 32 Vict., c. 101, s. 22.
[5] S. 23.

the form of schedule (H), No. 1, of the Act of 1868;[1] or (but only if the disposition A to B contains a precept of sasine) (*d*) by expeding and recording an instrument of sasine in favour of C in the form of schedule (B) of the Act of 1845, with warrant of registration in the form of schedule (H), No. 1, of the Act of 1868;[2] or (*e*) after symbolical delivery, by expeding and recording, within sixty days of its date, an instrument of sasine in favour of C in the old form, with a warrant of registration in the form of schedule (H), No. 1, of the Act of 1868,[3]—the last method, however, being competent only in the event of the precept of sasine being in the old form.

Or,

1. Assignation B to C, in the form of schedule (M), No. 2, of the Act of 1868, written on the disposition A to B.[4]
2. Infeftment in favour of C, either (*a*) by recording disposition A to B, and assignation B to C, with warrant of registration in favour of C in the form of schedule (H), No. 1, of the Act of 1868;[4] or (*b*) by expeding notarial instrument in the form of schedule (N) of the Act of 1868 in favour of C, and recording the disposition A to B, with a warrant of registration in the form of schedule (H), No. 2, of the Act of 1868 in favour of C, and the notarial instrument docqueted with reference to the warrant of registration;[1] or (*c*) by expeding and recording a notarial instrument in favour of C in the form of schedule (J) of the Act of 1868, with a warrant of registration in the form of schedule (H), No. 1, of the Act of 1868;[1] or (but only if the disposition A to B contains a precept of sasine) (*d*) by expeding and recording an instrument of sasine in favour of C in the form of schedule (B) of the Act of 1845, with warrant of registration in the form of schedule (H), No. 1, of the Act of 1868, whether the precept was in the form authorised by the Act of 1845 or in the old form;[5] or (*e*) after symbolical delivery, by expeding and recording within sixty days of its date an instrument of sasine in favour of C in the old form, with a warrant of registration in the form of schedule (H), No. 1, of the Act of 1868,[3] in the event of the precept being in the old form.

Or,

1. Either (*a*) disposition and assignation, or (*b*) simple assignation not in statutory form, or (*c*) disposition in ordinary terms, B to C.
2. Infeftment in favour of C, either (*a*) by expeding a notarial instrument in the form of schedule (N) of the Act of 1868 in favour of C, and recording the disposition A to B with a warrant of registration in the form of schedule (H), No. 2, of the Act of 1868, and the notarial instrument docqueted with reference to

[1] S. 23.
[2] S. 163, and 8 & 9 Vict., c. 35, s. 1.
[3] See p. 27, *supra*.
[4] S. 22.
[5] Ss. 163 and 141, and 8 & 9 Vict., c. 35, s. 1.

the warrant of registration;[1] or (*b*) by expeding a notarial instrument in favour of C in the form of schedule (J) of the Act of 1868, and recording it with a warrant of registration in the form of schedule (H), No. 1, of the Act of 1868;[1] or (but only if the disposition A to B contained a precept of sasine) (*c*) by expeding and recording an instrument of sasine in favour of C in the form of schedule (B) of the Act of 1845, with warrant of registration in the form of schedule (H), No. 1, of the Act of 1868, whether the precept was in the form authorised by the Act of 1845 or in the old form;[2] or (*d*) after symbolical delivery, by expeding and recording within sixty days of its date an instrument of sasine in favour of C in the old form, with a warrant of registration in the form of schedule (H), No. 1, of the Act of 1868,[3] in the event of the precept of sasine being in the old form.

II. Assignations to Personal Rights to Lands in the Sense of Section 9 of the Conveyancing Act, 1874.

Vesting of personal right under Act of 1874, s. 9.

The Conveyancing Act, 1874,[4] declares that a personal right to every estate in land descendible to heirs, *i.e.*, to heirs-at-law or of provision,[1] shall, without service or other procedure, vest, or be held to have vested, in the heir entitled to succeed thereto by his survivance of the person to whom he is entitled to succeed, whether such person died before or after the commencement of the Act, provided that the heir is alive at the date of the Act; and the Act declares such personal right to be transmissible in the same manner as a personal title to land under an unfeudalised conveyance.

How heir-apparent's assignee before 1874 could complete feudal title.

Before 1874, lands which belonged to an ancestor, and to which his heir had not completed a title, were deemed to be *in hereditate jacente* of the ancestor, and the heir had to complete a title before he was in a position to grant a conveyance thereof containing the means of immediately investing his disponee in them. It was, however, not uncommon for an heir-apparent, before he had taken any steps to vest himself in the lands *in hereditate jacente* of his ancestor, to dispone them to a purchaser. Along with a conveyance of the lands the heir granted authority, either in the disposition or apart from it, to complete his own title.[5] On receiving the conveyance the disponee could com-

[1] S. 23.
[2] Ss. 163 and 141, and 8 & 9 Vict., c. 35, s. 1.
[3] See p. 27, *supra*.
[4] S. 9, and see p. 145, *supra*.
[5] See Jur. Styles (4th ed.), i. 104.

plete his title either by first taking infeftment on the disposition in his favour, and then having a feudal title made up in the person of the heir, by which the infeftment in his own favour was validated *accretione*;[1] or by first making up a feudal title in the person of the heir, and then taking infeftment under the disposition in his own favour. When before 1874 an ancestor died with only a personal title to land, and his heir desired to transfer this personal title to a third party, the heir sometimes adopted the method of granting an assignation of the unexecuted warrants in the ancestor's favour and a mandate to his assignee to expede a general service in his (the heir's) favour. After service was expede in favour of the heir, the assignee could take infeftment by expeding and recording, along with the deed containing the unexecuted warrants, a notarial instrument, specifying the disposition in the ancestor's favour, the extract decree of general service in favour of the heir, and the assignation in his own favour, or, where it was not desired to record the whole of the deed, by expeding and recording a notarial instrument alone,[2] and then obtain entry by a charter or writ of confirmation; or he could, after service had been expede, obtain a charter of resignation in virtue of the procuratory or clause of resignation in the ancestor's title, and take infeftment on the charter of resignation.

How personal right under section 9 of Act of 1874 transferred.

A transferee, however, of a personal right under section 9 of the Act of 1874 is not entitled to complete a real right to the lands without judicial procedure. He can present a petition under section 10 of the Act of 1874 to have it found that he is entitled to procure himself infeft in the lands, and on obtaining an extract decree on the petition in his favour he can take infeftment in the lands by recording it with a warrant of registration in his favour in the appropriate Register of Sasines. An heir who has a personal right to lands in the sense of section 9 of the Act, may, in transferring his interest in the lands, ignore this right, and grant, as before 1874, a disposition containing a mandate to his disponee to complete a title in his

[1] *Glassford's Exrs.*, 12 D. 893; *Neilson*, M. 7773; *Paterson*, M. 7775, 3 Ross' L.C. 304; and see p. 30, *supra*.

[2] 21 & 22 Vict., c. 76, s. 14, schedules (K) and (B); 31 & 32 Vict., c. 101, s. 23, schedules (N) and (J).

person, in which case the disponee will have it in his option to complete a title either by petition in terms of section 10 of the Act of 1874, or by the method in use before 1874.

III. Assignations of *jura crediti* to Lands.

Where a trustee holds lands under an obligation to convey them to a beneficiary, or where a person enters into a contract by missives for the purchase of heritage, or where a person comes under an obligation to convey lands to another, then the beneficiary, the buyer, or the obligee respectively is said to have a *jus crediti* to the lands; or, in other words, whilst such person has a right to insist on a conveyance of the lands in his favour, he cannot complete a real right, *i.e.*, a feudal title, to them "without the aid of a third party or of the Court as fulfilling an obligation incumbent on such third party."[1] Such *jura crediti* are effectually transferred by the holders of them by assignations duly intimated to the obligors in the obligations which constitute them.[2] If the holder of a *jus crediti* to lands grants a conveyance of them, as if he were infeft in them, it will receive effect as an assignation of his *jus crediti*.[3] As the assignation does not communicate to the assignee a right capable of being completed by infeftment, he requires, in order to get a feudal title to the lands, to obtain a conveyance of them from the person who holds them under obligation to denude himself of them, or, in the event of his being unable to obtain such a conveyance, to adjudge them.[4]

1 Bell's Lect. ii. 771.
2 *Ibid.*
3 *Paul*, 13 S. 818.
4 M'Laren on Wills and Succession, ii. 846.

CHAPTER IX

BURGAGE TENURE

ERECTION OF ROYAL BURGHS: SUBINFEUDATION OF LANDS HELD BURGAGE: DISPOSITIONS OF PROPERTY HELD BURGAGE: ASSIGNATIONS OF PERSONAL TITLES TO BURGAGE LANDS UNDER CONVEYANCES ON WHICH NO INFEFTMENT HAS FOLLOWED, OF PERSONAL RIGHTS TO BURGAGE LANDS IN THE SENSE OF SECTION 9 OF THE CONVEYANCING ACT, 1874, AND OF *JURA CREDITI* TO BURGAGE LANDS; AND TENURE OF BOOKING.

I. Burgage Tenure.—Erection of Royal Burghs.

Constitution of royal burgh and tenure.

Burgage is the tenure by which royal burghs hold of the Crown the lands and houses lying within the limits of their charters of erection.[1] A royal burgh is constituted by charter of erection from the Crown. This charter erects the subjects into a royal burgh, and bestows the privileges to be enjoyed by the burgh, in return for which it provides for the services of watching and warding, and in some cases for other prestations, *e.g.*, for a "burgh maill" to the Crown.[2] The services of watching and warding are of the *naturalia* of burgage tenure, and are due although the charter of erection is silent regarding them.[3] The vassal being a community, which never dies, the charter does not require to be renewed, nor is land held by burgage tenure subject to casualties, with the exception of the casualty of liferent escheat.[4]

Burgage lands now conveyed as feu.

The Conveyancing Act, 1874, abolishes from the commencement of the Act any distinction between estates in land held burgage, or by the tenure of booking in the burgh of Paisley,

[1] Ersk. 2, 4, 8; Bell's Lect. ii. 792; Craig, 1, 10, 31.

[2] Duff, 49.

[3] See Erskine and Bell, *supra*; and *Hay*, M. 15,031.

[4] Hope's Minor Practicks, 96.

and estates in land held feu, in so far as regards the conveyances relating thereto, or the completion of titles, or any of the matters or things to which the provisions of the Act relate, under this proviso, that writs affecting land which immediately prior to the Act was held burgage shall be recorded in the Burgh Register of Sasines, and that writs affecting land in the burgh of Paisley held by the tenure of booking shall be recorded in the Register of Booking therein.[1]

II. Subinfeudation of Lands held Burgage.

Before 1874, the magistrates of a royal burgh were entitled,[2] for an adequate consideration, and after an Act of Council and advertisement, to feu such lands as had not been used for the prescriptive period for the common use and enjoyment of the inhabitants; but while an individual burgage holder might grant a heritable bond with precept for infeftment, or even alienate his holding,[3] it was thought that he had no power to grant a feu of it.[4]

Subfeuing by magistrates and by individual burgesses.

The Conveyancing Act, 1874,[5] provides (1) that proprietors of estates in land held burgage shall be entitled to grant feus of their estates, and (2) that the titles of all such feus granted before the Act shall be unchallengeable on the ground either that such feus are of land held by burgage tenure, or that such titles have been recorded in the Burgh Register of Sasines.

Recording of writs relating to burgage subjects.

Prior to the commencement of the Act of 1874, when feus of burgage subjects were granted, the feu-rights required to be recorded in the appropriate Register of Sasines, and not in the Burgh Register;[6] but it seems that this rule was not uniformly observed, and hence the last-mentioned provision of the Act of 1874. Feu-rights granted on or after 1st October 1874 of subjects formerly held burgage, and all dispositions and other writs affecting such feus, should be recorded in the Burgh

1 S. 25, and see p. 10, *supra*.

2 *Dean*, M. 2522; Ersk. 2, 4, 9; Duff, 51; Bell's Lect. ii. 793; and see *Magistrates of Selkirk*, 6 S. 955; *Dawson and Mitchell*, 6 S. 19, aff. 4 W. & S. 81; *Magistrates of Perth*, 9 S. 225, 13 S. 1100; *Magistrates of Arbroath*, 10 M. 630; *Beck*, 14 S. 1056; *Leslie*, 3 D. 164; 3 Geo. IV., c. 91, ss. 5 and 6.

3 Bell's Lect. ii. 1155.

4 Duff, 51; Bell's Lect. ii. 794.

5 S. 25.

6 *Earl of Fife's Trs.*, 4 D. 1245; *Davie*, June 2, 1814, F.C.; cf. *Dixon*, 2 S. 176; and see *Town Council of Brechin*, 3 D. 216, 2 Ross' L.C. 111; *M'Cutcheon*, 3 R. 565.

Register; and all dispositions and other writs relating to feus created before 1st October 1874 of subjects which, prior to the creation of the feus, were held burgage, may be registered in the appropriate division of the General Register of Sasines, or in the Burgh Register of Sasines.

Insertion of feudal conditions in burgage titles.

Before 1874, magistrates, like individual burgage holders, could dispone burgage subjects to be held in free burgage, and they can still do so. They cannot, however, engraft feudal conditions on a burgage tenure, as, for example, by stipulating for an annual payment and for payment of a sum at the entry of each heir and singular successor.[1]

III. Disposition of Property held Burgage.

A person infeft in burgage subjects now transmits them by disposition, and the disponee completes his title by recording the disposition in the appropriate Burgh Register of Sasines, or, instead of recording the disposition, by expeding a notarial instrument and recording it in such register. Before dealing with the modern form of a disposition of subjects held burgage, and infeftment thereon, it is necessary to deal with the forms formerly in use.

Comparison of burgage with feudal disposition.

1. *Disposition and Infeftment prior to the Infeftment Act, 1845.*—The principal differences between a disposition of feudal subjects and a disposition of burgage subjects in the respective forms in use before 1845, were: (1) that the latter contained no precept of sasine; (2) that the holding expressed in it was not *a me* or *a me vel de me*, but to be held of His (or Her) Majesty in free burgage for service of burgh used and wont; and (3) that the clause of relief was from cess, annuity, ground-annuals, etc.[2] A precept of sasine by a party infeft in burgage lands was inept.

Infeftment before 1845.

After delivery of the disposition, the disponee took infeftment by symbolical resignation and delivery, after which an instrument of resignation and sasine in his favour was expede and recorded in the appropriate Burgh Register. The ceremony

[1] *Magistrates of Arbroath*, 10 M. 630; and see *Magistrates of Perth, supra*; *Dawson and Mitchell, supra*; and *Edgar*, 5 Br. Sup. 730.

[2] See Jur. Styles (3rd edition), i. 604.

of resignation and delivery took place on the ground of the lands disponed, and five persons were present at it: (1) a procurator, acting for both the disponer in resigning the lands and the disponee in obtaining symbolical delivery thereof; (2) the town-clerk, who acted as notary public; (3) one of the bailies of the burgh, as representing the Crown; and (4 and 5) two witnesses. The town-clerk having read the warrant, the procurator, acting for the disponer, in virtue of the procuratory of resignation in the disposition, resigned the lands by staff and baton[1] into the hands of the bailie, as into the hands of the Crown. The bailie thereupon gave sasine to the procurator, now acting for the disponee, by delivering to him the symbols of earth and stone. The procurator accepted these symbols, and took instruments in the hands of the town-clerk. In some burghs, when a tenement of houses was disponed, the procurator, in addition to accepting these symbols, took hold of the hasp and staple of the door. After resignation and delivery in the manner described had been made, the town-clerk expede an instrument of resignation and sasine, which, signed by himself and the two witnesses, was recorded within sixty days of its date in the register of the burgh in which the lands lay.

Registration of instruments of resignation and sasine.

The provisions of the Statute 1617, c. 16, did not apply to subjects held by burgage tenure; but by a later Act the provisions of the Act of 1617 regarding registration were extended to sasines of tenements within royal burghs, and all reversions, regresses, bonds, or writs for making reversions or regresses, assignations thereto, discharges thereof, renunciations of wadsets, and grants of redemption of such tenements, and it was provided that these writs should be inserted in the town-clerk's books of the several burghs respectively within sixty days after the date of the same, and that the town-clerk should keep a register depending only on the magistrates of the burgh, and without necessity of any warrant from the Clerk Register.[2] A practice having arisen in some burghs of shorten-

[1] Act of Sed. 11th Feb. 1708; *Carnegy*, M. 14,316; *Earl of Aberdeen*, M. 14,316.

[2] 1681, c. 11.

ing or altogether omitting the notarial docquet of an instrument of resignation and sasine in registering it, the Act 10 Geo. IV., cap. 19, enacted that the keepers of the Registers of Sasines within burgh should engross in their registers at length the notarial docquets subjoined to all instruments of sasine of tenements within burgh respectively, under pain of nullity. The Act, however, saved the sufficiency of such instruments recorded before the passing of the Act, though the docquets had been abbreviated or altogether omitted in the recording.

2. *Disposition and Infeftment after the Infeftment Act, 1845, till the Burgage Lands Transference Act, 1847.*—The Infeftment Act, 1845,[1] enacted that instruments of sasine and instruments of cognition relating to subjects held burgage should be effectual if attested by the town-clerk as a notary, without the addition of his docquet, and by the witnesses, and that the delivery of symbols might be given either on the ground of the subjects as before the Act, or within the Council Chamber of the burgh by delivery of a pen. Otherwise, the Act of 1845 made no difference in the mode of taking infeftment in burgage subjects. Infeftment Act, 1845.

3. *Disposition and Infeftment after the Burgage Lands Transference Act, 1847, till the Titles to Land Act, 1860.*—The Burgage Lands Transference Act, 1847, provided short forms for these clauses:—(1) a clause declaring the term of entry; (2) a clause of obligation to infeft; (3) a procuratory of resignation; (4) a clause of obligation to free and relieve of cess, annuity, ground-annual, and other public, parochial, and local burdens; (5) a clause of assignation of rents; (6) a clause of assignation of writs and evidents; (7) a clause of warrandice; and (8) a clause of registration for preservation and execution,[2]—and gave the same import to clauses (5), (7), and (8) as the Lands Transference Act, 1847, gave to the same clauses, in the same form, in a disposition of subjects held feu. Under clause (6) the disponee only acquired right to all open procuratories. Clause (2) was declared to imply an obligation on the disponer to infeft the disponee by resignation, to be holden of Her Majesty in free burgage for service of burgh used and wont; Disposition after Burgage Lands Transference Act, 1847. Form.

[1] S. 7. [2] S. 1.

clause (3) was declared to be equivalent to a procuratory of resignation in the terms used before the Act in regard to heritable property held burgage; and clause (4) was declared to import, unless specially qualified, an obligation to relieve of all cess, annuity, ground-annual, and other public, parochial, and local burdens exigible from or on account of the subjects conveyed prior to the date of entry.[1] The Act also made provision for referring in a disposition of lands held burgage to real burdens affecting them.[2]

Infeftment after 1847.

The Burgage Lands Transference Act, 1847, made it competent for a disponee to resign burgage lands by presenting to the town-clerk of the burgh, being a notary public, the deed under which infeftment was sought, and for such town-clerk to give sasine by subscribing and recording an instrument of resignation and sasine in the form prescribed by the Act.[3]

Registration.

Such an instrument of resignation and sasine might be effectually recorded at any time during the life of the party in whose favour it was expede, and the date of presentment and entry set forth on it by the keeper of the record was to be taken as its date.[4]

Disposition after Titles to Land Act, 1860.

4. *Disposition and Infeftment after the Titles to Land Act, 1860, till the Titles to Land Consolidation Act*, 1868.—The Titles to Land Act, 1860, whilst providing that nothing in it should prevent the constitution, transmission, or completion of rights to lands held burgage by the forms in use prior to the passing of the Act,[5] made it unnecessary to insert in any conveyance of lands held burgage either a clause of obligation to infeft or a procuratory or clause of resignation,[6] and made it competent to describe such lands by reference,[7] and to insert a clause directing part of the conveyance to be recorded.[8]

Infeftment and registration after 1860.

The Act of 1860 authorised (*a*) the taking of infeftment by recording a conveyance of lands held burgage, with a warrant of registration;[9] (*b*) the expeding and the recording of a notarial

1 S. 2.
2 S. 4; and see p. 51, *supra*.
3 S. 5, schedule (D).
4 S. 7.
5 S. 14.
6 S. 6.
7 S. 34, and schedule (H), No. 1.
8 S. 5, and schedule (C).
9 S. 3.

instrument, instead of the recording of the conveyance, when the conveyance of the lands was contained in a deed granted for further purposes and objects, or conveyed separate lands, or separate interests in the same lands, to the same or different persons;[1] (*c*) the recording of a conveyance in terms of any clause of direction contained in it,[2] if the warrant of registration made reference to the clause of direction;[3] and (*d*) the recording, at any time within the life of the person on whose behalf they were presented for registration, of all conveyances and instruments of cognition and other notarial instruments authorised by the Act to be recorded in the Register of Sasines.[4]

Tenure of booking.

All the provisions of the Act of 1860 relating to lands held by the ordinary burgage tenure were made applicable to lands in the burgh of Paisley held by the tenure of booking.[5]

5. *Disposition and Infeftment after the Titles to Land Consolidation Act*, 1868, *till the Conveyancing Act*, 1874.—The Titles to Land Consolidation Act, 1868, repealed the provisions of the Burgage Lands Transference Act, 1847, and of the Titles to Land Act, 1860, and re-enacted them with variations.[6] Under this Act the form of a disposition of burgage subjects is as follows:[7]—

Titles to Land Consolidation Act, 1868.

Form.

"[*After the inductive and dispositive clauses the deed may proceed thus:*] With entry at the term of [*here specify the date of entry*]; to be holden the said lands and others [*or* subjects] of Her Majesty in free burgage; and I assign the writs, and have delivered the same according to inventory; and I assign the rents; and I bind myself to free and relieve the said disponee and his foresaids of all ground-annual, cess, annuity, and other public burdens; and I grant warrandice; and I consent to the registration hereof for preservation [*or* for preservation and execution]. In witness whereof [*insert a testing clause in the usual form*]."

If this schedule is compared with schedule (A) of the Act of 1847, it will be noticed that it is somewhat shorter, and alters the sequence of some of the clauses; and that, whilst it expresses the manner of holding, it contains neither an obligation to infeft nor a clause of resignation. The provisions of the

1 S. 4.
2 S. 5.
3 S. 25.
4 S. 13.
5 S. 23.
6 Ss. 7–16.
7 S. 7, schedule (B), No. 2.

Titles to Land Consolidation Act, 1868, regarding (*a*) descriptions by reference;[1] (*b*) general name;[2] (*c*) incorporation of real burdens by reference;[3] (*d*) the clause directing part of the conveyance to be recorded;[4] and (*e*) infeftment,[5]—apply to dispositions of subjects held burgage as well as to dispositions of subjects held feu. Accordingly, a disponee of burgage subjects, whose disponer's title is complete, can, since the commencement of the Act, take infeftment (*a*) by recording, at any time within his lifetime, his disposition, with a warrant of registration thereon in his favour, in the appropriate Burgh Register of Sasines;[6] or (*b*) by expeding and recording in such register a notarial instrument in or as nearly as may be in the form of schedule (J);[7] and the notarial instrument, unlike the disposition itself, did not, before 1874, require a warrant of registration.[8] Further, a disponee of burgage subjects, in addition to the two ways just mentioned, could, after 1868, take infeftment, at least if his disposition contained an obligation to infeft and a procuratory or clause of resignation, by (*c*) expeding and recording an instrument of resignation and sasine in the form of schedule (I) of the Act;[9] or by (*d*) the procedure in use before 1847.

Infeftment.

Tenure of booking.

All the provisions of the Act of 1868 applicable to lands held burgage are also applicable to lands in the burgh of Paisley held by the tenure of booking.[10]

Conveyancing Act, 1874.

6. *Disposition and Infeftment in their present form*, i.e., *since the commencement of the Conveyancing Act*, 1874.—The distinctions between estates in lands held burgage, or by the tenure of booking, and estates in land held feu, in so far as regards the conveyances relating thereto, or the completion of titles, or any of the matters to which the provisions of the Conveyancing Act, 1874, relate, having been abolished by that Act,[11] conveyances of land held burgage or by the tenure of booking prior to 1st October 1874 may now be in the forms

Form after 1874.

[1] S. 11; and see p. 34, *supra*.
[2] S. 13; and see p. 34, *supra*.
[3] S. 10; and see p. 52, *supra*.
[4] S. 12; and see p. 53, *supra*.
[5] S. 15; and see p. 68, *supra*.
[6] S. 15.
[7] S. 17.
[8] S. 141. See 37 & 38 Vict., c. 94, s. 33.
[9] S. 16. (repealed by S.L.Rev. Act 1893)
[10] S. 152.
[11] S. 25.

allowed by the Titles to Land Consolidation Act, 1868, or in the forms applicable to lands held feu.

The provisions of the Act of 1874 as to the word "dispone,"[1] description of lands by reference,[2] the incorporation of burdens by reference,[3] and date of entry[4] apply to dispositions alike of subjects held feu and of subjects held burgage.

Infeftment after 1874.

Now, as before 1874, a disponee of burgage subjects can take infeftment by recording the disposition in the appropriate Burgh Register with a warrant of registration in the form No. 1 of schedule (H) of the Act of 1868,[5] or by expeding and recording in such register a notarial instrument in the form of schedule (J) of that Act,[6] with a warrant of registration in the same form. It will be noticed that before the commencement of the Conveyancing Act, 1874, a notarial instrument could be recorded in a Burgh Register without a warrant of registration, but that since 1874 all writs, before being recorded in any Register of Sasines, require warrants of registration.[7] Section 16 of the Titles to Land Consolidation Act, 1868, has been repealed,[8] and accordingly it is no longer competent for a disponee of subjects held burgage to take infeftment by the expeding and recording of an instrument of sasine (or of resignation and sasine) in the form of schedule (I) of that Act. It is thought that, as the Conveyancing Act, 1874, declares that a procuratory or clause of resignation, if inserted in a disposition of subjects, is to be held *pro non scripto*,[9] it is incompetent to complete a title by means of an instrument of resignation and sasine in the older forms in use before the Burgage Lands Transference Act, 1847, if the disposition is granted after the commencement of the Conveyancing Act, 1874.

Summary.

As a summary of what has been stated regarding infeftment in burgage subjects, the steps by which such infeftment could be taken at different dates may be set forth in the following tabular form:—

1 S. 27; and see p. 31, *supra*.
2 S. 61; and see p. 34, *supra*.
3 S. 32; and see p. 52, *supra*.
4 S. 28; and see p. 54, *supra*.
5 31 & 32 Vict., c. 101, s. 15.
6 *Ibid.*, s. 17.
7 S. 33; and see s. 141 of 31 & 32 Vict., c. 101.
8 Statute Law Revision Act, 1893.
9 S. 26.

(1) *Before the Infeftment Act*, 1845.

i. Disposition containing procuratory of resignation.
ii. Resignation by staff and baton in the hands of one of the bailies of the burgh, and symbolical delivery of earth and stone by him, all on the ground of the lands.[1]
iii. Instrument of resignation and sasine (having long notarial docquet), signed by the town-clerk as a notary and two witnesses on each page.[1]
iv. Recording of the instrument of resignation and sasine in the Burgh Register within sixty days of its date.[1]

(2) *After the Infeftment Act*, 1845, *till the Burgage Lands Transference Act*, 1847.

i. Disposition containing procuratory of resignation.
ii. Resignation by staff and baton in the hands of one of the bailies of the burgh, and symbolical delivery by him of earth and stone, all on the ground of the lands, as before 1845; (*or*) resignation in the hands of one of the bailies and symbolical delivery by him within the council chamber of the burgh, the delivery of symbols in this case being represented by delivery of a pen.[2]
iii. Instrument of resignation and sasine (with or without long notarial docquet), signed by the town-clerk as a notary and by the two witnesses on each page.[2]
iv. Recording of the instrument of resignation and sasine in the Burgh Register within sixty days of its date.[2]

(3) *After the Burgage Lands Transference Act*, 1847, *till the Titles to Land Act*, 1860.

i. Disposition containing procuratory or clause of resignation.
ii. Instrument of resignation and sasine in the form of schedule (D) of the Act of 1847, signed by the town-clerk, being a notary, on each page, and by two witnesses on the last page only.[3]
iii. Recording of instrument of resignation and sasine in the Burgh Register during life of the person in whose favour such instrument had been expede.[4]

(*Or,*)

i. Disposition containing procuratory or clause of resignation.
ii. Ceremony of resignation and delivery of sasine as before 1845, on the grounds of the lands, (or) as after 1845, within the council chamber of the burgh.[5]
iii. Instrument of resignation and sasine in the old form (with or without the long notarial docquet), attested by the town-clerk, being a notary, and by two witnesses.[5]
iv. Recording of instrument of resignation and sasine within sixty days of its date.[5]

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[1] See p. 166 *et seq.*, *supra*.
[2] S. 7.
[3] 10 & 11 Vict., c. 49, s. 5.
[4] Ss. 6 and 7.
[5] 8 & 9 Vict., c. 35, s. 7; and see p. 167, *supra*.

(4) *After the Titles to Land Act*, 1860, *till the Titles to Land Consolidation Act*, 1868.

i. Disposition with or without procuratory or clause of resignation.[1]

ii. Either (*a*) recording the disposition with a warrant of registration ;[2] or (*b*) if the disposition was for further purposes and objects, or conveyed separate lands or separate interests in the same lands, by expeding and recording a notarial instrument in the form of schedule (B) of the Act of 1860,[3] the disposition or notarial instrument, as the case might be, being recorded in the Burgh Register of Sasines within the lifetime of the party in whose favour it was.[4]

Or,

If disposition contained an obligation to infeft and a procuratory or clause of resignation, by the methods competent before 1860.

(5) *After the Titles to Land Consolidation Act*, 1868, *till the Conveyancing Act*, 1874.

i. Disposition with or without procuratory or clause of resignation.[5]

ii. Either (*a*) recording the disposition with a warrant of registration in the form No. 1 of schedule (H) of the Act of 1868 ;[6] or (*b*) in any case where it was not desired to record the whole deed, expeding and recording a notarial instrument in the form of schedule (J) of the Act of 1868,[7] the disposition or notarial instrument being recorded in the Burgh Register of Sasines within the lifetime of the party in whose favour it was.[8]

Or,

If the disposition contained a procuratory or clause of resignation, by expeding and recording an instrument of resignation in the form of schedule (I) of the Act of 1868,[9] or by the methods competent before 1860.

(6) *After the Conveyancing Act*, 1874.

i. Disposition containing no procuratory or clause of resignation.[10]

ii. Recording of (*a*) disposition, or (*b*) notarial instrument in the form of schedule (J) of the Act of 1868,[11] the disposition or notarial instrument having a warrant of registration in the form of schedule (H) of the Act of 1868[12] in favour of the person in whose behalf it is, and being recorded within the lifetime of such person in the Burgh Register of Sasines.[13]

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1 23 & 24 Vict., c. 143, s. 6.
2 S. 3.
3 S. 4.
4 S. 13 ; and 10 & 11 Vict., c. 49, s. 7.
5 31 & 32 Vict., c. 101, s. 7.
6 S. 15.
7 S. 17.
8 S. 142.
9 S. 16.
10 37 & 38 Vict., c. 94, s. 26.
11 31 & 32 Vict., c. 101, s. 17.
12 37 & 38 Vict., c. 94, s. 33.
13 31 & 32 Vict., c. 101, s. 142.

IV. Assignation of Personal Titles to Burgage Land under Conveyances on which no Infeftment has followed; of Personal Rights to Burgage Lands in the sense of Section 9 of the Conveyancing Act, 1874; and of *Jura Crediti* to Burgage Lands.

How personal titles to burgage land can now be transmitted and feudalised.

A personal title to land held burgage under a conveyance on which no infeftment has followed, can now—*i.e.*, since the commencement of the Titles to Land Consolidation Act, 1868—be transmitted and feudalised in the same way as personal titles to lands held in feu under unfeudalised conveyances. Accordingly, any person having right to an unrecorded conveyance can assign it (1) by an assignation either in the form No. 1 of schedule (M) of the Act of 1868, written apart from the conveyance;[1] or (2) by assignation in the form of No. 2 of that schedule, written on the conveyance;[1] or (3) by disposition and assignation;[2] or (4) by simple assignation, not in either of the statutory forms;[2] or (5) by disposition in ordinary terms;[2] and the person in whose favour the assigning writ in any of these five forms is granted can take infeftment in the same mode or modes as if the lands were held feu,[3] with this difference, that the writs are recorded in the appropriate Burgh Register of Sasines instead of in a division of the General Register of Sasines.

Methods before and after 1860.

Before the Titles to Land Act, 1860, a personal title to burgage lands could be transmitted by (1) a disposition and assignation; or (2) a simple assignation; or (3) a disposition in ordinary terms, the writs in any of these three forms being used as a mid-couple in taking infeftment. The Act of 1860, in extending the provisions of the Titles to Land Act, 1858, to lands held burgage, provided that any person in right of an unrecorded conveyance of lands held burgage could assign the conveyance by assignation written either apart from[4] or on[5] the conveyance, and provided forms for such assignations.[6] The Act authorised infeftment in the case of such assignation

1 S. 22.
2 See p. 148, *supra*.
3 See p. 146 *et seq.*, *supra*.
4 Schedule (F), No. 1.
5 Schedule (F), No. 2.
6 S. 9.

written apart from the conveyance, by recording[1] the conveyance, with a warrant of registration thereon,[2] and the assignation docqueted with reference to the warrant of registration; or in the case of such assignation written on the conveyance, by recording[1] the conveyance and the assignation along with a warrant of registration;[3] or whether the assigning writ was an assignation in either of the two forms introduced by the Statute, a disposition and assignation, an assignation in neither of the statutory forms, or a disposition in ordinary terms, by recording[4] either the conveyance assigned, with a warrant of registration,[5] and a notarial instrument[6] docqueted with reference to the warrant of registration; or a notarial instrument.[7]

Rights under section 9 of Act of 1874, and *jura crediti*.

A personal right to land held burgage in the sense of section 9 of the Conveyancing Act, 1874, and a *jus crediti* to such lands, can be assigned, and a title thereto completed in the same way as if the lands were held feu.[8]

V. Tenure of Booking.

Peculiarities of this tenure.

Booking is a tenure by which lands in the burgh of Paisley are held, and deeds relating to land held by this tenure are recorded in a special register known as the Register of Bookings, Reversions, etc., kept in Paisley by the town-clerk. Such lands are held of the burgh, and not, as in the case of lands held burgage, of the Crown; and casualties can be exacted for them at the rate of a merk Scots per acre for heirs, and a merk Scots per rood for singular successors.[9]

Old method of infeftment.

Before 1860 infeftment was given to a disponee of lands held by the tenure of booking in this way:—A person, acting as procurator for the disponer, appeared before the Council in the council chamber, and produced the disposition, and, in virtue of the procuratory of resignation contained therein, resigned by staff and baton the lands into the hands of the Council for "new and heritable booking" to the disponee. The Council accepted the resignation, delivered back the staff and

1 S. 9.
2 Schedule (A), No. 2.
3 Schedule (A), No. 1.
4 S. 10.
5 Schedule (A), No. 2.
6 Schedule (G).
7 Schedule (B).
8 See p. 160 *et seq.*, *supra*.
9 See *Chalmers*, 7 S. 718.

baton to the procurator, now acting as attorney for the disponee, and entered and booked the disponee in the lands. Thereupon the procurator, as attorney for the disponee, took instruments in the town-clerk's hands, and the composition due for the disponee's entry was paid. This ceremony, known as an act of booking, was embodied in a minute recorded in the Register of Bookings, Reversions, etc., and the disponee received an extract therefrom. This extract, termed an extract booking, bore to be extracted from the records of the burgh of Paisley by the clerk of the burgh, and was signed by him. The provisions of the Titles to Land Act, 1860, and subsequent Statutes, so far as applicable to lands held by burgage tenure, are applicable also to lands held by the tenure of booking.

CHAPTER X

ADJUDICATIONS IN IMPLEMENT

Before the Acts of 1858 and 1860, a disposition from which the executive clauses were absent could not, unless the disposition was from one not infeft, and contained an assignation to writs, be used even as a mid-couple, and was deemed nothing more than an obligation to convey on the part of the disponer in favour of the disponee. Such a disposition was called a general disposition; but the term "general disposition" is wide, including, as it does, dispositions which contain, along with the usual executive clauses, only a general description of the lands, and which, as has been shown, could be used only as mid-couples.

Disposition from which executive clauses absent.

I. Adjudication in Implement before Lands Transference Act, 1847.

Suppose that A, infeft in lands held feu, granted a disposition without executive clauses to B, then B, not being able to take infeftment by means of it, made up his title by the following procedure:—(1) B raised a summons of adjudication in implement against A, and obtained a decree adjudging the lands from A, and decerning and declaring them to belong to himself; (2) obtained from the superior of the lands, in virtue of his decree, a charter of adjudication if A was entered with the superior, or a combined charter of adjudication and confirmation if A was not so entered; and (3) took infeftment on the precept of sasine contained in the charter, by expeding an instrument of sasine and recording it in the appropriate Register of Sasines. If the lands had been held burgage, B would have used the decree as a warrant for an instrument of resigna-

How general disponee completed a title before 1847—(*a*) as against disponer.

(1) Summons of adjudication.

(2) Charter of adjudication.

(3) Infeftment.

tion and sasine, to be recorded in the appropriate Burgh Register. Further, a decree of adjudication operated, before the Acts of 1847, as an assignation to any unexecuted procuratories or precepts held by A applicable to the lands contained in the deed.

(*b*) As against disponer's heir.

If A had died before B proceeded to make up his title, and B failed to get the heir-at-law of A to make up a title to the lands and convey them to him, B used the following procedure:[1]

(1) Letters of general charge.

—(1) B raised and executed against A's heir letters of general charge, which passed the Signet, and charged the heir to enter himself heir to his ancestor within forty days. By fiction of law this charge had the same effect, in a question with the charger, as if the heir had incurred representation of his ancestor.

(2) Action of constitution.

(2) Next, B raised an action of constitution against A's heir, rested on the general disposition and the general charge, concluding that the heir should be ordained to make up a title to the lands and dispone the same to B. The fiction was that the decree in this action imposed the implement of the obligation on the heir himself.

(3) Letters of special charge.

(3) B raised against A's heir letters of special charge (or if A had not been infeft, letters of general special charge). Such letters, whether of special charge or of general special charge, also passed the Signet. The letters of special charge charged the heir, on twenty days' warning, to enter himself heir in special in the lands contained in the general disposition. The fiction was that the effect of the charge thereon was equivalent to service and infeftment in favour of the heir. On the other hand, the letters of general special charge charged the heir, also on an *induciæ* of twenty days, to enter himself heir in general to his ancestor, and thereby to establish in his person a right to the personal title which was held by his ancestor. The fiction regarding the effect of the charge under letters of general special charge was that it operated as a general service in favour of the heir.

(4) Action of adjudication.

(4) B then raised an action of adjudication in implement against A's heir, and obtained thereunder a decree containing a warrant to charge the superior to enter and infeft him.

(5) Charter of adjudication.

(5) B thereafter obtained a charter of adjudication, or,

[1] Bell's Lect. ii. 819.

if necessary, a combined charter of adjudication and confirmation, from the superior of the lands in which A was infeft. (6) B took infeftment on the precept of sasine in the charter of adjudication by expeding an instrument of sasine and recording it in the appropriate Register of Sasines. If the lands had been held burgage, B would have used the decree of adjudication as a warrant for the expeding of an instrument of resignation and sasine, and recorded this instrument in the appropriate Burgh Register. In the event of A having only a personal title to the lands, whether held feu or burgage, B, after (1) executing letters of general charge, (2) obtaining decree of constitution, (3) executing letters of general special charge, and (4) obtaining decree of adjudication in implement against A's heir, could take infeftment by using the decree of adjudication in implement as an assignation to the unexecuted warrants applicable to the lands to which A had right, and thereafter obtain confirmation.

(6) Infeftment.

Where disponer's title personal.

Where the heir renounced his right to the lands, no decree of constitution or of adjudication could be obtained against him, nor could letters charging him to enter himself heir in special or in general to his ancestor be executed against him. When the heir renounced his right to be heir in the lands, the general disponee raised an action of constitution and adjudication *contra hæreditatem jacentem*, and obtained thereunder, first, a decree of constitution *cognitionis causa tantum*,—*i.e.*, a decree ascertaining the obligation of the deceased to the effect of authorising adjudication in implement thereof,—and then a decree of adjudication in implement *contra hæreditatem jacentem*. This decree the general disponee used for the purposes of infeftment in the same way as an ordinary decree of adjudication in implement.

Where heir renounced succession.

If an heir who had made up no title granted a disposition of lands to which he was entitled, it was unnecessary to fix representation or to constitute any obligation against him, because the disposition granted by him was deemed to be an acknowledgment of his heirship, and a constitution of his obligation to give a proper title. Accordingly, there was no

Where heir granted general disposition.

need before 1847 of letters of general charge, or of an action of constitution. The only necessary steps against such an heir were—(1) letters of special or general special charge, according to the state of his ancestor's title; (2) action of adjudication; (3) charter of adjudication, or, if need be, combined charter of adjudication and confirmation; and (4) infeftment.

Priority of adjudication.

Among different adjudgers a preference is established by priority of infeftment in the lands adjudged. Where two persons adjudged in implement the same lands, and neither of them obtained infeftment therein, the adjudger who first charged the superior to enter him was preferred to the other, the charge in such a case being deemed equivalent to infeftment.[1]

II. Adjudication in Implement after Lands Transference Act, 1847.

General and special and general special charges incompetent after 1847.

By the Lands Transference Act, 1847, the use of letters of general charge, special charge, or general special charge was made incompetent. This statute made the citation on and execution of the summons in an action of constitution equivalent to a general charge, the citation on and execution of a summons of adjudication equivalent to a special charge or general special charge, as the circumstances might require, and made it competent to combine the actions of constitution and adjudication in one summons, to pronounce decree of constitution and adjudication in one interlocutor, and to extract the same in one extract.[2]

Decrees of adjudication and of sale contained after 1847 warrant for infeftment *a me vel de me*.

This Act also (1) made it lawful for the Judges of the Court of Session to insert in a decree of adjudication in implement a warrant for infeftment;[3] (2) entitled the adjudger and his heirs and successors, in virtue of the decree, to complete their title by obtaining a charter of adjudication from the superior of the lands, and taking infeftment thereon, or where the person adjudged from was entered with his superior, or in a situation to charge such superior to grant entry by confirma-

[1] *Sinclair*, M. 56; and see *Wright*, 1 S. 92 (where Court refused a second adjudication in implement of same subjects); Bell's Lect. ii. 823.

[2] S. 16.

[3] S. 19, schedule (K). The warrant was granted *periculo petentis*,—*Liddle*, 18 D. 61.

tion, by taking infeftment by means of a notarial instrument.[1] This infeftment was valid as a base infeftment until confirmed by the superior,[2] in virtue of the warrant contained in the decree.

Lands Transference Burgage Act, 1847.

The Lands Transference Burgage Act, 1847, extended the provisions of section 16 of the Lands Transference Act, 1847, to decrees of adjudication in implement of lands held by burgage tenure;[3] and made it competent, by section 5, to take infeftment on such decrees by expeding an instrument of sasine,[4] and recording it in the appropriate Burgh Register.

Adjudication of long leases.

The Registration of Leases Act, 1857, allowed an adjudger of a recorded lease, or of an assignation in security falling under the Act, to complete his title by recording the abbreviate of adjudication in the Register of Sasines in which the lease was recorded,[5] whether the adjudication was led against the party vested in the right thereof or against his heir.

III. Adjudication in Implement after Titles to Land Acts, 1858 and 1860.

Conjunction of summonses of constitution and adjudication.

The Titles to Land Act, 1858, provided (1) that the actions of constitution and adjudication might be combined in one summons, whether the heir renounced the succession or not;[6] (2) that actions of constitution and actions of constitution and adjudication against an apparent heir on account of his ancestor's debt or obligation, and actions of adjudication against such heir on account of his own debt or obligation, might be insisted in at any time after the lapse of six months from the date of his becoming apparent heir;[6] (3) that a decree of adjudication of such estate should be equivalent to a conveyance from such ancestor in favour of the adjudger,[7] except where the subjects were heritable securities, in which case the recorded decree should have the same effect as a recorded assignation.

Annus deliberandi reduced to six months.

Effect of decree of adjudication.

Notarial instruments in favour of general disponees.

By rendering it unnecessary to insert a precept of sasine in any conveyance,[8] the Act of 1858 made it unnecessary for the

1 Schedule (L).
2 S. 19.
3 S. 8.
4 S. 5, schedule (D).
5 S. 10.
6 S. 27.
7 S. 27; and see ss. 31 and 36 of 23 & 24 Vict. c. 143.
8 S. 5.

holder of a general disposition, without a precept of sasine and the other executive clauses, to resort to adjudication in implement for the purpose of obtaining a title to the lands. The Act[1] made it competent to the disponee under a general conveyance, or any party acquiring right to such conveyance, to make up his title by expeding and recording a notarial instrument.[2]

Titles to Land Act, 1860.

Burgage.

The Titles to Land Act, 1860, extended the provisions of section 27,[3] as well as those of section 12[4] of the Act of 1858, to burgage subjects; that is, the Act made it unnecessary to raise separate summonses of constitution and adjudication against an apparent heir on account of his ancestors' debt or obligation for the purpose of attaching lands held burgage, forming part of the ancestors' heritable estate, and reduced the *annus deliberandi* to six months;[5] and also made it competent for a disponee under a general conveyance, *mortis causa* or *inter vivos*, comprehending lands held burgage, to make up his title by means of a notarial instrument.[6]

Charters of adjudication operate as confirmation of writs.

The Act of 1860 also made charters of adjudication, as well as charters of resignation or charters of sale, operate as a confirmation of the whole deeds and instruments necessary to be confirmed in order to complete the investiture of the grantee.[7]

IV. Adjudications in Implement since Titles to Land Consolidation Act, 1868.

Form of adjudication against heir.

The Titles to Land Consolidation Act, 1868, while repealing the previous statutes, re-enacted their provisions to the effect of leaving the law practically as it was.[8]

Under the Conveyancing Act, 1874, a decree of adjudication is declared to be equivalent to a conveyance (except in the case of heritable securities, where it is equivalent to an assignation);[9] and if the person whose lands are adjudged is infeft, the adjudger may take infeftment under section 15 of

1 S. 12.
2 Schedule (H).
3 See p. 181, *supra*.
4 See p. 182, *supra*.
5 S. 16.
6 S. 8, Schedule (E).
7 S. 39.
8 Ss. 60, 61.
9 S. 62, 65.

the Consolidation Act by treating the decree as a conveyance. If the person whose lands are adjudged is not infeft, the decree is treated as an assignation, and infeftment may be taken in any of the ways permitted by sections 22 and 23 of the Consolidation Act.[1]

Charter of adjudication now incompetent.

The holder of a decree of adjudication in implement or of sale, in order to enter himself with the superior, had before 1874 to obtain, after infeftment, a charter or writ of confirmation, or before infeftment, a charter of adjudication. These, however, are not now either necessary or competent.[2] Between 1868 and 1874 the effect of infeftment following on the decree, where the person from whom the lands were adjudged was entered with the superior, or in a situation to charge the superior to grant entry by confirmation, was to constitute an effectual feudal investiture in the lands held base of the person whose lands were adjudged. The effect of confirmation, by charter or writ of confirmation, was to make the lands to be held immediately of the superior. The adjudger or purchaser, by taking infeftment in any of the modes above mentioned, becomes indebted to the superior in such composition as is payable by law. Before 1874 he was bound to pay the same on receiving from the superior a charter or writ of confirmation.

Casualty due by adjudger.

How general disponee completes title.

It is still competent, but unnecessary, for a general disponee to make up title by means of a decree of adjudication in implement. He may complete a title by expeding and recording a notarial instrument.[3]

1 S. 62.

2 37 & 38 Vict., c. 94, s. 4 (1).

3 As to lands, see 31 & 32 Vict., c. 101, s. 19; heritable securities and real burdens, see *ibid.* and s. 127, and 37 & 38 Vict., c. 94, ss. 30, 53, 54; and long leases, 20 & 21 Vict., c. 26, ss. 5, 8.

CHAPTER XI

HOW (1) TRUSTEES UNDER TRUST-DEED FOR CREDITORS; (2) TRUSTEES ON SEQUESTRATED ESTATES; (3) LIQUIDATORS OF LIMITED LIABILITY COMPANIES; (4) HOLDERS OF DECREES OF DIVISION OF COMMONTY, ETC.; AND (5) HOLDERS OF DECREES OF SALE IN TERMS OF THE GLEBE LANDS ACT, 1866, MAKE UP TITLE

I. Trust-Deed for Creditors.

Trust-disposition for creditors.

To avoid the expense of a sequestration, a debtor in embarrassed circumstances sometimes grants a trust-disposition for behoof of his creditors.[1] In the trust-disposition he dispones his heritable estate to a trustee or trustees named. If the estate is not described in the trust-disposition, the trustee completes a title thereto by recording a notarial instrument in the form of schedule (L) of the Titles to Land Consolidation Act, 1868.[2] If the estate is described particularly or by reference in statutory form, the trustee completes a title thereto by recording either the trust-disposition or a notarial instrument. If the truster's title is not feudalised, the trust-disposition is treated as an assignation to it.[3]

The radical right remains in truster.

Notwithstanding the trust-disposition, the radical right to the estate remains in the truster, and can be adjudged.[4] If any part of the estate remains unsold after the purposes of the trust have been executed, the truster requires no reconveyance of such part;[5] and the truster's heir makes up a title, not by conveyance from the trustee, which would not vest anything in him, but as if the trust did not exist.[6]

Heir makes up title as if there had been no trust.

[1] See for form Jur. Styles (5th ed.), i. 144; and Goudy on Bankruptcy, 518, 848.

[2] S. 19.

[3] See p. 148, *supra*.

[4] *M'Millan*, 9 S. 551, aff. 7 W. & S. 441; *Campbell*, M. *voce* Adjudication, App. No. 11, 1 Ross' L.C. 458; *Donaldson*, 1 Ross' L. 464; *Campbell*, 1 Ross' L.C. 464.

[5] *Lindsay*, 6 D. 771.

[6] *Gilmour*, 11 M. 853.

II. Trustee on Sequestrated Estate.

Act and warrant.

The effect of the act and warrant in favour of the trustee on a sequestrated estate is, *inter alia*, to vest the heritable as well as the moveable estate of the bankrupt in the trustee, subject to all such preferable securities as existed at the date of the sequestration and are not null or reducible.[1]

Completion of title.

The trustee, without making up a title to the heritable estate, may, without the consent of the bankrupt, grant conveyances thereof. These conveyances are as effectual to the purchaser as if they had been granted by the bankrupt with concurrence of the trustee.[2]

The trustee may make up a title to the heritable estate (not including heritable securities and long leases), if he desire to do so, in these ways:—

If Bankrupt's Title Feudalised.	If Bankrupt's Title Unfeudalised.
(1) *With Intervention of Bankrupt.*	
1. By getting a disposition from bankrupt, and (*a*) by recording it, or (*b*) by expeding and recording notarial instrument thereon.[3]	1. By getting an assignation from the bankrupt, and (*a*) by recording the bankrupt's title and the assignation, or (*b*) by recording the title and a notarial instrument, or (*c*) by recording a notarial instrument, setting forth the transaction.[4]
(2) *Without Intervention of Bankrupt.*	
1. By expeding and recording a notarial instrument in the form of schedule (O) of the Titles to Land Consolidation Act, 1868.[5]	1. By expeding and recording a notarial instrument in the form of schedule (O) of the Titles to Land Consolidation Act, 1868;[6] or 2. By recording the conveyance in favour of the bankrupt, with a warrant of registration in favour of the trustee, in the form of No. 2 of schedule (H) of the Titles to Land Consolidation Act, 1868, along with a notarial instrument in the form of schedule (N) of that Act, docqueted with reference thereto.[7]

[1] 19 & 20 Vict., c. 79, s. 102; and see especially *Heritable Reversionary Co., Ltd.*, 19 R. (H.L.) 43; and on *acquirenda*, see s. 103, and *Millar*, 1 F. 614.

[2] 19 & 20 Vict., c. 79, s. 105.

[3] 31 & 32 Vict., c. 101, ss. 15, 17.

[4] Ss. 22, 23.

[5] S. 25.

[6] S. 25.

[7] S. 23.

Heritable securities.

A trustee may complete a title to heritable securities with or without the intervention of the bankrupt. A trustee, without such intervention, may complete a title to heritable securities to which the bankrupt has either a recorded or a personal title by recording a notarial instrument in the form of schedule (LL) of the Consolidation Act, 1868.[1] If the bankrupt's title is personal, the trustee, using his act and warrant as an assignation to the unrecorded bonds, can also complete his title by recording the unrecorded bond, with a warrant of registration in his own favour, along with a notarial instrument, docqueted with reference thereto, or by simply recording a notarial instrument setting forth the whole transaction.[2]

(1) When bankrupt's title recorded or personal;

(2) When personal.

Long leases.

It is competent for a trustee on a sequestrated estate to make up a title to a long lease, or an assignation in security of a long lease, under the Registration of Leases Act, 1857, by recording a notarial instrument in the form of schedule (F) of the Act.[3]

III. Liquidators of Joint-Stock Companies.

How they make up a title.

By the Titles to Land Consolidation Act, 1868,[1] liquidators of Joint-Stock Companies under the Companies Acts can make up a title to lands held by the company by recording a notarial instrument in the form of schedule (O) of the Act, and to heritable securities by recording a notarial instrument in the form of schedule (LL) of the Act. These forms can be used whether the company holds by a feudal or a personal title. If the company holds by a personal title, the liquidator can also make up a title under section 23 of the Act, using as an assignation the appointment in his favour.

IV. Division of Commonty, or of Common Property, or of Runrig Lands.

By section 35 of the Conveyancing Act, 1874, a decree of division—

(1) Of commonty; or
(2) Of common property; or
(3) Of runrig lands;

[1] S. 25.
[2] *Ibid.* s. 23.
[3] S. 11.

whether pronounced by a court of law, or by arbiters, or by an oversman, is equivalent to a conveyance containing assignations of writs by all the joint proprietors. If the joint proprietors are infeft, infeftment may be taken in virtue of the decree by recording it with a warrant of registration in the Register of Sasines. If the proprietors are not infeft, the decree is treated as an assignation, or one of a series of assignations, of an unrecorded conveyance, or of a personal right under section 9 of the Act of 1874.

V. Sale of Glebe.

By section 36 of the Conveyancing Act, 1874, a decree of sale obtained in terms of section 17 of the Glebe Lands (Scotland) Act, 1866, has the effect of a conveyance by the minister of the parish, at the sight of the heritors of the parish, and of the presbytery of the bounds, to the heritor in whose favour it is pronounced, of the glebe or portion of glebe therein contained. By recording an extract of the decree in the Register of Sasines, the heritor acquires a feudal title to the glebe or the part of the glebe described in the decree, with a holding of the Crown for payment of one penny Scots yearly, if asked only, as if he had been infeft on a Crown charter in his favour.

DIVISION II.

CHAPTER I

TERMS DESCRIPTIVE OF HEIRS: INSTITUTES AND SUBSTITUTES: PRESUMPTION IN HERITABLE DESTINATIONS FOR SUBSTITUTION: EVACUATION OF DESTINATIONS: DESTINATIONS TO STRANGERS: DESTINATIONS TO SPOUSES: DESTINATIONS TO PARENTS AND CHILDREN

How technical words construed.

I. TERMS DESCRIPTIVE OF HEIRS.—In construing technical words used for describing different classes of heirs, that meaning which the law has ascribed to them can be modified only by express declaration or necessary implication.[1]

Meaning of —"Heirs" and "Heirs whatsoever."

The expressions "heirs" and "heirs whatsoever" are used as synonymous terms. The terms "heirs" and "heirs whatsoever" are flexible, and are construed *secundum materiam subjectam*,[2] and may apply, (1) in a deed relating to *heritage*,[3] in the case of successions opening after the commencement of the Conveyancing Act, 1874, to either (*a*) the heir-at-law, the heir of line, or the heir-general (the heir-at-law, the heir of line, or the heir-general being the person to whom the law before 1874 gave heritable property acquired by inheritance, and since then gives all heritable property),[4] or (*b*) the heir of provision (*i.e.*, the heir called under a destination of the estate),[5] or (*c*) a special heir, *e.g.*, the heir of the body. In the case of heritable successions opening before the commencement of the Conveyancing Act, 1874, the terms "heirs" and "heirs whatsoever" may apply also to (*d*) the heir of conquest, *i.e.*, the person on whom the law, prior to abolition of the distinction

"Heir-at-law," "Heir of line," "Heir-general."

"Heir of Provision."

"Heir of Conquest"

[1] Bell's Prin. 1694, and authorities there cited, especially judgment of Lord Eldon in *Ker*, 5 Pat. 320.

[2] *Blair*, 12 D. 97; *Stevenson*, M. 14,852; *Bowie*, Feb. 23, 1809, F.C.; *Robertson*, Elch. 'Mutual Contract," No. 19.

[3] See *Murray*, M. 14,952; *Fairservice*, M. 2317; *Farquharsons*, M. 6596, 2290; M'Laren, ii. 760.

[4] Menzies, 674; Duff, 323; M'Laren, i. 444.

[5] Menzies, 674.

between fees of heritage and fees of conquest, bestowed certain heritable estate acquired by singular title, as opposed to inheritance. The terms "heirs" and "heirs whatsoever" apply, (2) in a deed relating to *moveables*,[1] to the heirs in moveables at common law as amended by the Intestate Moveable Succession Act, 1855; and (3) in a deed relating to estate, *heritable and moveable*, both to the heir in heritage according to the rules of feudal succession and to the heirs in moveables.[2]

"Heirs" in mixed succession.

If the import of the term "heirs" be defined in the deed in which it occurs, that import will receive effect,[3] and the import may be determined from the context or from extrinsic circumstances, even where the import so attached to the word is different from the ordinary technical meaning.[4]

Import of "heirs" may be defined.

In the case of successions opening before 1st October 1874, there was and is a difference between the meaning of the term "heir" in the case of succession to heritage and its meaning in the case of succession to conquest. The difference between conquest and heritage has been explained thus:—"Conquest is what has come into the person of the deceased by purchase, gift, or other singular title from a stranger, or from one to whom he would not by law have succeeded. Heritage is that to which one has succeeded as heir-at-law to his father or other relation."[5] Conquest included only heritable subjects for completing of a feudal title to which sasine was necessary. When a person died intestate and without issue, but leaving both elder and younger brothers, or no brothers or sisters, but uncles both elder and younger than his or her father, then his immediate younger brother (or uncle) and his issue took the heritage, whilst the elder brother (or uncle) and his issue took the conquest. Where the intestate was only survived by sisters, they, as heirs-portioners, took heritage and conquest equally among them; and if the youngest brother died childless, his immediate elder brother, in the character of heir of line,[3] took his heritable estate, however acquired.

What conquest was or is.

To what conquest applied.

Conquest ascends; heritage descends.

[1] See H.R. p. 518, n. 6.

[2] *Blair*, 12 D. 97; *Mitchell's Trustees*, 11 M. 206.

[3] *Campbell's Trs.*, 16 S. 1004; *Grieve's Trs.*, 8 S. 896.

[4] *Richardson*, 1 S. 105, aff. 2 S. App. 149.

[5] Bell's Prin. 1670, 1672, and authorities there cited.

If (*a*) conquest was disponed by a stranger directly to the "heirs" of a person; or if (*b*) it was disponed by a stranger to A and his heirs, and the succession opened to A's heir, as A's constructive conditional institute;[1] or if (*c*) the maker of a destination (which had become operative) called at the end of it either his own heirs, or (*d*) the heirs of another person to whom the fee was not destined,[2]—then the heir of line, even according to the law as it was before 1874, in all these four cases, took the conquest, the term *heirs* in such cases being held to denote the heir-at-law in heritage. But, on the other hand, if a person bought or otherwise acquired heritage from a stranger, and took the title to himself and his heirs,[3] or if such a person disponed, by *mortis causa* deed, such property to A, whom failing, his own heirs, and the succession opened to the heirs as constructive conditional institutes,[4] the term heirs in both these cases was, before 1874, interpreted to mean the heir of conquest.

Distinction between heritage and conquest abolished.

Section 37 of the Conveyancing Act, 1874, abolished the distinction between fees of heritage and fees of conquest with respect to all successions opening after the commencement of the Act, and provided that fees of conquest should descend to the same persons in the same manner and subject to the same rules as fees of heritage.

Heirs-male.

The meaning of the term "heir-male" is the nearest male heir who can claim exclusively through males; and the term thus applies only to institutes or substitutes in the direct or collateral line connected by males, and excludes females and males connected through females;[5] and the expression "heirs-male lawfully begotten" is synonymous with the expression "heirs-male."[6] "Heir-male of line" has been held to apply to the nearest heir-male to the exclusion of the heir of conquest.[7]

Heirs of the body.

The term "heirs of the body" denotes a limitation of the legal order of succession to heirs in the direct line of descent

[1] *Miller*, 9 S. 295, aff. 7 W. & S. 1.
[2] *Mackintosh*, 11 M. 636; *Robison*, 21 D. 905; *Boyd*, M. 3070.
[3] *Boyd, supra*; *Short*, M. 5615, 2 Pat. 495.
[4] See *Robison*, 21 D. 910; but see M'Laren, i. 82, 444.
[5] Bell's Prin. 1697; Bell's Lect. ii. 1076.
[6] But see *Braid*, 22 D. 433.
[7] *Sinclair*, M. 14,944.

who are of the blood of the ancestor named;[1] and the term "heirs of a marriage" denotes the children of the marriage, and their issue in the order of legal succession.[1]

Heir-male of the body.

The "heir-male of the body" means the eldest son or other nearest male heir descended from the person named and connected with such person exclusively through males;[2] and the "heir-male of a marriage" means the eldest son or other nearest male heir descended of the marriage, and also connected with the spouses exclusively by males.[3]

Heir-male of marriage.

Heir-male when construed as heir-male of the body on the ground of necessary implication.

Whilst the rule is that the term "heirs-male" receives its ordinary technical meaning,[4] the intention of the maker of the deed in which it occurs may be sufficient to assign to it a restricted meaning, such as heirs-male of the body.[5]

Heir-female.

The term "heir-female" means the heir-at-law, male or female, connected with the ancestor through males or females; and the term "heir-female of the body" means the heir-at-law, male or female, in the direct line of descent. When heirs-female are mentioned in a destination, they are usually called after heirs-male, *e.g.*, to A B and his heirs-male, whom failing to his heirs-female. Under such a destination, when A's heirs-male are exhausted, and not sooner, his next nearest heir male or female, who may be in no way related to the last heir, is entitled to the succession.[6] Just as "heir-male" in a deed has been construed, on account of the context, to mean heir-male of the body, so "heir-female" in a deed will also be deprived, when necessary implication demands, of its ordinary meaning, and will be read as meaning heir-female of the body.[7] It is also decided that where there is a destination "to the eldest daughter or heir-female" of the body of a marriage, the term

Heir-female of the body.

Eldest daughter or heir-female.

1 M'Laren, i. 444.

2 See *Hay*, *infra*, and *Braid*, *infra*; Bell's Prin. 1700; Bell's Lect. ii. 1077.

3 Bell's Lect. ii. 1077.

4 *Hay*, M. 2315, aff. 3 Pat. 142; *Shepherd*, 15 S. 173, aff. 3 S. & M'L. 255; *Dykes*, Feb. 9, 1811, F.C.; *Campbell*, M. 14,949.

5 *Kev*, M. "Tailzie," App. No. 13, aff. 5 Pat. 320; *Braid*, 22 D. 433; *Campbell's Trs.*, 16 S. 1004; and see *Earl of Northesk*, 10 R. 77.

6 *Dalrymple*, Elch. *voce* Provisions to Heirs, No. 2; rev. 1 Pat. 237 (where held, *inter alia*, that, under a destination by A to the heirs-male of his body, whom failing, to his heirs-female, A's granddaughter by his son entitled to succeed in preference to A's immediate daughter and to the daughter of a second son who died last seised in the estate); and see *Johnstone*, 2 D. 73; and *Leslie*, 6 Pat. 792 (where under destination "to heir-male *or* eldest heir-female of the body," heirs-female held to be substituted to the heirs-male of the body).

7 *Connell*, 5 M. 379; and see *Mackenzie*, 22 R. 839, rev. 23 R. (H.L.) 32.

"heir-female" overrules the term "daughter," and accordingly that, in a competition under such a destination between the heir-at-law (in the case cited, the daughter of a son) and the immediate daughter of the marriage, the former falls to be preferred.[1] But, on the other hand, if an estate is destined to a daughter or eldest daughter without a qualifying expression such as heir-female, the daughter will succeed, although there be a nearer heir-female in existence.[2]

Heirs-portioners.

Heirs-portioners are females in the same degree of propinquity to the deceased. They succeed to equal *pro indiviso* shares. Descendants of a predeceasing heir-portioner are included among the heirs-portioners, and they take their parents' share *per stirpes*.[3]

Children; bairns.

Where a bequest, whether of heritage or moveables, is made to children or bairns, the rule is that the immediate lawful descendants of the person designated take the bequest equally among them to the exclusion of those more remote.[4] Necessary implication from a deed may, however, show that a bequest of heritage to children is meant for the eldest son only.[5]

Heirs and bairns.

Where there is a destination of heritage to "heirs and bairns" or to "heirs and children," the word heirs is the governing term, and the heir-at-law is alone entitled to the estate,[6] unless the deed, as a whole, shows that these expressions must be interpreted to mean the whole children.[7]

Issue.

The word "issue" in the ordinary sense includes direct descendants of every degree.[8] The expression "issue of the marriage" usually means every person lineally descended of the marriage,[9] but its meaning may be restricted by the context to immediate issue, to the exclusion of grandchildren.[10]

(1) Institute.

II. Institutes and Substitutes.—(1) An institute is the person first named or called to succeed to an estate under a

[1] *Lyon*, 5 Br. Sup. 663; and see Lord President Blair in *Ker*, Nov. 13, 1810, F.C.; Bell's Lect. ii. 1079.

[2] *Ker*, *supra*, aff. 5 Pat. 579.

[3] Bell's Lect. ii. 1076.

[4] See *Brown*, M. 2375, 12,842; *Kinloch*, M. 12,841, 3 Br. Sup. 218; *Hay*, M. 12,839; *Herries*, Hume, 528; *Wilson*, Hume, 534; *Kibble*, 10 S. 341; *Waddell*, 6 S. 999; *Carnegie*, M. 12,840; *Jardine*, 12 D. 504; Fraser, ii. 1403; *Adams' Trs.*, 23 R. 828; *Ballantyne's Trs.*, 25 R. 621; *Turnbull*, 3 S.L.T. No. 250.

[5] *Maitland*, 2 M. 417; and see Bankton, 3, 5, 48; Fraser, ii. 1404.

[6] *Reid*, M. 14,483; *Fairservice*, M. 2317, 14,486; *Duncan*, Feb. 9, 1813, F.C.

[7] *Wilsons*, M. 12,845; *Lamond*, M. *voce* Provisions to Heirs, App. No. 1.

[8] *Turner's Trs.*, 24 R. 619; and see *Macdonald*, 19 R. 567, rev. 20 R. (H.L.) 88; *Dalziel*, 7 F. 545.

[9] *Macdonald* v. *Hall*, *supra*.

[10] *M'Murdo's Trs.*, 24 R. 458; *Cattanach's Trs.*, 4 F. 205.

destination in a deed; to use other words, an institute "is the direct and immediate disponee under a conveyance, or other grant,—the person thereby first called to take the fee of the estate, or sum of money, or as the case may be."[1] For example, A may dispone property, by *mortis causa* undelivered deed or by *inter vivos* delivered deed, either (*a*) to himself, whom failing, to B; or (*b*) to B, whom failing, to C. In (*a*) A himself is institute, and in (*b*) B is institute. An institute under a destination makes up a title as a disponee, not as an heir.[2]

(2) Proper conditional institute.

(2) A proper conditional institute is the person who is first named or called under a destination to take an estate if a certain condition is purified. Thus A may, on condition of his death without having had issue, or on condition of his leaving no child, or on any similar condition, dispone by *mortis causa* deed an estate to B, whom failing, to C.[3] If the condition on which the disposition is to take effect is purified, B is called a proper conditional institute, and he completes his title as a disponee under the deed; but if the condition is not purified, the destination to B, whom failing, to C, becomes inoperative.[4]

(3) Constructive conditional institute.

(3) A constructive conditional institute is the person who, whilst not first called under a destination in a *mortis causa* undelivered deed, yet first takes the succession, because the person or persons called before him in the destination have predeceased the maker. Thus, suppose that A, by *mortis causa* undelivered deed, dispones heritage to B and the heirs-male of his body, whom failing, to C; that B predeceases the testator, without leaving a male heir of his body,—then C is constructive conditional institute. A constructive conditional institute takes as a disponee, and he should make up a title as such.[5]

(4) Substitutes.

(4) A substitute is a person called in a destination after the institute or a prior substitute or substitutes. Thus, if a destination is to A, whom failing, to B, whom failing, to C, A is the institute in the destination, and B and C are substitutes; and as soon as A takes a vested right under the deed containing

[1] Bell's Lect. ii. 844.

[2] *Gordon*, M. 15,465; *Maxwell*, Hume, 875; *Erskine*, M. 4406.

[3] On the effect of a destination-over in the event of a liferenter or prior legatee (1) dying without issue, or (2) dying without leaving issue, see M'Laren, i. 706 *et seq*

[4] *Stevenson*, M. 14,862.

[5] *Hutchison*, 11 M. 229.

the destination, B or C can on his death make up a title to the estate disponed only as a substitute. But there is a rule of law that a substitution includes a conditional institution in the same character. Accordingly, if the destination just cited occurs in a *mortis causa* undelivered deed, and if A, the named institute, predeceases, and B survives the maker of it, B, although he is *ex facie* of the destination a substitute, takes the estate as a constructive conditional institute, and as such completes a title; and if A and B predecease, and C survives the maker of the deed, C takes the estate as a constructive conditional institute. Where, however, a person, in virtue of a destination, has taken the estate as an institute, a proper conditional institute, or a constructive conditional institute, any person succeeding under the destination thereafter is a substitute. The rule that a substitution includes a conditional institution applies to moveable as well as to heritable rights. Thus, if a legacy is left to A, and his heirs and assignees, and another legacy to A, whom failing, to B, and A predeceases the testator, then the heirs *in mobilibus* of A in the former case, and B in the latter, are entitled, in the character of conditional institutes, to the bequest.

How substitutions generally introduced.

Substitutions in destinations are indicated by the words "and," "and to," "whom failing to"; but the ordinary use of the words "and" and "and to," as opposed to "whom failing to," is to substitute the heirs of the person last named in the destination,[1] whereas the ordinary use of the words "whom failing to" is to introduce a new branch into the destination.[2]

Distributive destinations.

In a destination the recurrence of the word "and," as opposed to "whom failing," indicates what has been called a distributive destination.[3] What this means may be made clear by an illustration. A destination may be either to A and the heirs-male of his body, and the heirs whatsoever of the body of the said heirs-male; or to A and the heirs-male of his body, whom failing, to the heirs whatsoever of the body of the said heirs-male. In the former case, the heirs

[1] *Grant*, 11 S. 484.

[2] M'Laren, i. 440; and Lord Low in *Thompson's Trs.*, 2 F., at p. 496.

[3] M'Laren, i. 440, and 447 *et seq.*

of the body whatsoever of the first heir-male to whom the succession opens have, on the death of such heir-male, a right to succeed prior to the remoter heirs-male of the body of A, the institute ; [1] but the heirs in the second clause (whom failing, to the heirs whatsoever of the body of the said heirs-male) are held not to be substituted to each individual heir-male as the succession opens to him, but to be substitutes under the destination, only entitled to take under it on the exhaustion of all the heirs-male of the body of the institute.[2]

There is this material distinction between a substitute and an institute of any sort, that a substitute must make up a title in the character of an heir, and by such methods as are open to an heir, whilst the institute makes up his title as a disponee. Further, there was, before 1874, this practical distinction between an institute of any sort and a substitute, that then, as now, the institute took by force of the grant as soon as it came into operation, whilst nothing vested in the substitute until he took steps to complete his title as heir of provision. This latter distinction has, however, disappeared in consequence of the provisions of the Conveyancing Act, 1874, regarding *ipso jure* vesting of a personal right in an heir, whether heir-at-law or heir of provision.

(5) Conditional substitutes.

(5) A conditional substitute in a destination is a person who is called in a destination after the institute or a prior substitute or substitutes, and whose right to take the estate is subject to a certain condition being purified. Thus, if A dispones by delivered deed to B, and, in the event of B's dying without issue, then to C, C is a conditional substitute ; for if B dies survived by issue, the destination as regards B becomes inoperative, and if B dies without leaving issue, C makes up a title as substitute to B.

III. Presumption in Heritable Destinations for Substitution.—A substitution includes a conditional institution in the event of the institutes and prior substitutes predeceasing

[1] *Lockhart*, 15 S. 376, 2 D. 377, aff. 1 Bell's App. 202 ; *Forbes*, 6 M. 900, aff. 11 M. (H.L.) 44 ; *Johnstone*, 2 D. 73 ; *Earl of Eglinton*, 4 D. 425 ; comp. *Arbuthnott*, 7 M. 371, and Lord M'Laren's remarks thereon,—M'Laren, i. 448.

[2] M'Laren, i. 449.

the maker of a *mortis causa* deed; and this rule applies to heritable and moveable destinations. Thus, if A leaves a bequest of moveables by his trust-disposition to B, whom failing, to C, and B predeceases the testator, C, as constructive conditional institute, is entitled to the bequest.[1] But, in the construction of destinations relating to heritage, the presumption is always in favour of substitution,[2] whereas, in the construction of destinations relating to moveable estate, the presumption is that conditional institution only, and not substitution, is intended by them,—*i.e.*, if one person, either as institute or conditional institute, is vested under a destination with a right to moveables, the destination is evacuated *quoad ultra*.[3] It may be added that, in destinations of mixed estate, *i.e.*, partly heritable and partly moveable, the presumption seems to be favourable to conditional institution merely, not substitution, especially when the deed comes into operation on a testator's death.[4]

Whilst the presumption is, in the case of heritage, for substitution, and in the case of moveables for conditional institution only, a deed may be so expressed as to import conditional institution only in heritage or a substitution in moveables[5]

IV. Powers of Institutes and Substitutes; or Evacuation of Destinations.—An institute or a substitute who has a vested right to the fee of an estate under a deed, not being a deed of entail, is, like any other fiar, entitled to dispose the estate for onerous or gratuitous consideration by deed, *inter vivos* or testamentary, to any person named by him, and thereby to evacuate the ulterior branch or branches of a destination in which he himself is named. To this rule, however, there are the following exceptions regarding gratuitous alienation. (1) A substitute in a destination under a marriage-contract, if a

(1) Fiar under a marriage-contract.

[1] See on conditional institution in moveables *Sutherland*, 4 M. 105; *Fyffe*, 3 D. 1205 (legacy under management); *Halliburton*, 11 R. 979 (mixed estate), distinguishing *Findlay*, 2 R. 909; *Bell's Executor*, 24 R. 1120; *Buchanan's Trs.*, 6 M. 536; Bell's Prin. 1881; M'Laren, i. 623; Bell's Lect. ii. 848.

[2] *Watson*, 11 R. 444; and see *Smith*, 9 S. 180; Ersk. 3, 8, 44; Bell's Prin. 1693; M'Laren, i. 439; *Brown's Trs.*, 2 F. 817; *Smith's Trs.*, 7 F. 815.

[3] *Brown*, M. 14,863; and see H.R. 547, n. 4.

[4] *Paul*, 10 M. 937; compare *Ramsay*, 1 D. 83; *Maclean's Trs.*, 16 R. 1095.

[5] *Hays*, 10 R. 460; and see remarks in this case of Lord President Inglis on *Smith*, 9 S. 180; cf. also *Marshall*, 2 F. 1023.

descendant of the marriage, has a *spes successionis in obligatione*, which the institute and fiar cannot defeat gratuitously by any *inter vivos* or testamentary deed. The reason for this is that a marriage-contract is, as regards the heirs of the marriage to which the contract applies, deemed onerous. Further, if the marriage-contract shows that it was *pars contractus* that the rights of stranger substitutes were to be treated as contractual and obligatory, such substitutes, like heirs or other descendants of the marriage, will have a *spes successionis* not merely *in destinatione*, but *in obligatione*, which cannot be defeated by any gratuitous deed.[1] (2) Again, it would appear that, if there is a gratuitous disposition by a disponer to a stranger, or to a stranger and his heirs, and this destination is followed immediately by a clause of return to the disponer and his heirs, such stranger disponee, though fiar, cannot disappoint the clause of return by gratuitous deed.[2] (3) There are cases in which a fiar may have the power of gratuitous alienation by *inter vivos* deed, and yet not have the power of alienation by testamentary deed. Examples of such cases are where the fiar has settled the estate belonging to him at the time of his death, by marriage-contract[3] or by testamentary writing, in such a way as to prevent revocation[4] or to create an indefeasible right in another person.[5]

(2) Clauses of return.

(3) Where no testamentary power of disposal.

As in practice the question often arises whether a general settlement evacuates the destination under which the maker has right to a special piece of property, the following rules on the subject may be stated:—(1) A general settlement will not overrule a special destination either (*a*) where the maker of the general settlement has before[6] or after its date[7] acquired a property, and taken a title to it with a special destination;[8]

How far special destinations evacuated by general dispositions.

[1] Fraser, ii. 1410, and cases there cited.

[2] See *Duff*, M. *voce* "Member of Parliament," App. No. 13; *Mackay*, 13 S. 246; and see further on clauses of return, Ersk. 3, 8, 45; Bell's Prin. 1705; M'Laren, i. 559; Sandford on Entails, 45; *Massy*, 11 M. 173; and also *Watson's Trs.*, 21 R. 451.

[3] See Lord Kinnear in *Wyllie's Trs.*, 18 R. 1121; and Lord Watson in *Macdonald*, 20 R. (H.L.) 88, at p. 92.

[4] On revocation of mutual settlements, see chapter on Testamentary Deeds.

[5] *Paterson*, 20 R. 484; M'Laren, i. 415.

[6] See Lord Selborne in *Campbell*, 6 R. 310, aff. 7 R. (H.L.) 100; *Walker's Executor*, 5 R. 965; *Paton*, M. 11,376; *Currie*, 1 F. 684.

[7] See Lord Selborne in *Campbell*, *supra*; and *Webster's Trs.*, 4 R. 101; *Lang's Trs.*, 12 R. 1265; and see *Renton's Trs.*, 3 R. 1142.

[8] A destination of property taken by the testator to himself and "his heirs and assignees" held not a special destination so as to prevent the property being carried by his general settlement,—*Philip*, 13 R. 329.

or (*b*) where the maker of the general settlement has either before[1] or after its date[1] executed a deed containing a special destination of property belonging to him; because there is nothing inconsistent or unreasonable in reading and construing the general disposition as subordinate to the deed with the special destination. (2) A general settlement, however, will, in the absence of evidence of a contrary intention, carry estate held by the maker, either as institute or substitute, under a special destination, which was not made by himself, whether the succession under the special destination opened to him before[2] or after[3] the date of the general settlement, and whether or not he was aware of the fact that the succession had opened to him.[4] These rules may be upset by a controlling context,[5] or by the mode in which the granter of a general settlement has dealt in his deeds and transactions regarding specially destined subjects.[6]

V. DESTINATIONS TO STRANGERS.—The following are the chief rules[7] recognised, in the absence of a controlling context, for the interpretation of destinations to strangers, the term "strangers" being here used to denote those who do not occupy towards each other either the relation of spouses or the relation of parent and child.

Interpretation of destination to—

(1) A. (1) A destination to a person in an *inter vivos* delivered deed includes his heirs.[8]

(2) A, whom failing, B. (2) An immediate substitution of one person to another excludes the heirs of the latter,[9] except in cases where there is room for the operation of the condition *si institutus sine liberis decesserit.*

(3) A and his heirs, whom failing, B. (3) Under a destination to a person and his heirs (not of such a selected class as "heirs-male of the body"), whom failing, to others, the opening of the succession

[1] Notes 6, 7, 8, p. 197.

[2] *Campbell*, 6 R. 310, aff. 7 R. (H.L.) 100; *Thoms*, 6 M. 704.

[3] *Watson's Trs.*, 21 R. 451; and see *Webster's Trs.*, 4 R. 101.

[4] See *Campbell*, M. 14,855, aff. 1 Pat. 343; but see Lord Selborne on this case in *Campbell*, 7 R. (H.L.) at p. 101, and Lord Blackburn at p. 112.

[5] See Lord Selborne in *Campbell*, 7 R. (H.L.) 100.

[6] *Farquharsons*, M. 2290, aff. 6 Pat. 724; *Morrison's Trs.*, 7 F. 810, and cases in H.R. 556.

[7] See Ersk. 3, 8, 35; Bell's Lect. ii. 843; Bell's Prin. 1709; Duff, 320; Jur. Styles, 81.

[8] Bell's Prin. 1704; Bell's Lect. i. 585.

[9] *Ibid.*

to the heir-at-law of that person evacuates the rest of the destination,[1] unless the term "heirs" falls to receive a limited meaning.[2]

(4) But under a destination to a person and a selected series of heirs, whom failing to others, such selected heirs must be exhausted before the substitutes subsequently called are entitled to the succession.[3] (4) A and the heirs-male of his body (or other selected heirs), whom failing, B.

(5) Under a destination to two or more strangers, or to them and their heirs, each of them is a *pro indiviso* fiar, and on his death his share falls to his heir-at-law.[4] (5) A and B and their heirs.

(6) But under a destination to two or more strangers, and the survivors or survivor of them, and their heirs, or to them and the longest livers or liver of them, and their heirs, each is a *pro indiviso* fiar during his lifetime, and his share, so far as not disponed or burdened by his deeds, *inter vivos* or testamentary, and so far as not required for payment of his debts, falls on his death to the survivors or survivor, and on the death of the last survivor intestate, the fee descends to such survivor's heirs.[5] (6) A and B and the survivor and their heirs, or the longest liver and their heirs.

(7) Under a destination to two strangers in conjunct fee and liferent, each has a *pro indiviso* fee to the extent of one-half during his lifetime, but the survivor has, in addition to such *pro indiviso* share, a liferent of the other share, the fee of which, burdened with such liferent, falls to the predeceaser's heir-at-law, and on the death of the survivor his share of the fee descends to his heir-at-law.[6] (7) A and B in conjunct fee and liferent.

(8) Under a destination to two strangers and to the heirs of one of them, he whose heirs are called is, according to the text-books, fiar, and the other has only a liferent of a *pro indiviso* half.[7] (8) A and B and the heirs of B.

[1] See M'Laren, i. 460.
[2] M'Laren, i. 567, and see p. 189, *supra*.
[3] Bell's Lect. ii. 847.
[4] Ersk. 3, 8, 35; Duff, 320.
[5] Bell's Lect. ii. 843; *Bisset*, M. "Death-bed," App. No. 2.
[6] Ersk. 3, 8, 35; 1 Bell's Com. 62; Duff, 320.
[7] Ersk. 3, 8, 35; Bell's Lect. ii. 843; Bell's Prin. 1709; 1 Bell's Com. 62.

(9) A and B jointly and the heirs of B.

(9) Similarly, under a destination to two strangers jointly, and to the heirs of one of them, the one whose heirs are called is fiar, and the other has only a liferent of a *pro indiviso* half.

(10) A and B and to A, if he survives, and his heirs.

(10) Under a destination to two strangers, and to one of them if he survives, and his heirs, each of them is a *pro indiviso* fiar during their joint lives. If the person whose heirs are called is the survivor, he becomes the sole fiar to the exclusion of the heirs of the other, subject, however, so far as the predeceaser's share is concerned, to the deeds, *inter vivos* or testamentary, or debts of the predeceaser; but when the person whose heirs are called is the predeceaser, the one-half of the fee remains with the survivor, and the other half goes to the heirs of the predeceaser, in the event of his dying intestate.[1]

(11) A and B in conjunct fee and liferent, and to A, if he be the survivor, and his heirs.

(11) Under a destination to two strangers in conjunct fee and liferent, and to one of them if he shall survive, and his heirs, the person named as eventual survivor is, if he survives the other, the sole fiar, to the exclusion of the heirs of the other; but if the person named as eventual survivor is the predeceaser, the one-half remains with the survivor and the other half goes to the heirs of the predeceaser, burdened with a liferent in favour of the survivor.[2]

(12) A and B in conjunct fee and liferent, and to the heirs of A.

(12) Under a destination to two strangers in conjunct fee and liferent, and to the heirs of one of them, the fee is during their joint lives in them equally, under this qualification, that neither of them can disappoint the eventual liferent of the other, and on the death of the stranger whose heirs are not called, the other will, if the predeceaser has not disposed of his share, have the whole fee, but if the predeceaser has disposed

[1] Bell's Lect. ii. 843; Duff, 321.

[2] Jur. Styles (5th ed.), i. 112.

of his share, a fee of one-half and a liferent of the other half.[1]

(13) Under a destination to one stranger in liferent and another in fee, the fee belongs to the latter, burdened with a liferent in favour of the former.[2] (13) A in liferent and B in fee.

(14) But under a destination to two strangers in liferent, and to one of them in fee, the fee belongs to the one to whom it is destined, burdened with a liferent to the extent of one-half in favour of the other.[3] (14) A and B in liferent and A in fee.

(15) Under a destination in favour of two strangers and the longer liver (or survivor) in liferent, and to one of them in fee, the fee belongs to the one to whom it is destined, and the other has a liferent of one-half during the lifetime of the fiar, and a liferent of the whole in the event of his surviving the fiar.[4] (15) A and B and the survivor in liferent and A in fee.

(16) Under a destination to two or more strangers in joint or conjunct liferent, and to a different person in fee, the whole fee is burdened with a liferent so long as any of those named liferenters exist.[5] (16) A and B in joint liferent and C in fee.

(17) Under a destination to a person in liferent and his heirs in fee, the fee belongs to such person, whereas under a destination to a person in liferent allenarly (or under restrictive words of similar signification), such person has merely a right of liferent, and a fiduciary fee for behoof of his heir.[6] (17) A in liferent and his heirs in fee.

VI. Destinations to Husband and Wife.[7]—The following are the chief rules for the construction of destinations in favour of spouses :—

(1) A destination to spouses *in conjunct fee* is construed as if it were a destination to strangers—*i.e.*, it gives an equal right of fee to each; and a destination to spouses in conjunct fee and to the survivor in fee (1) To spouses in conjunct fee.

1 Jur. Styles (5th ed.), i. 112.
2 Bell's Prin. 1037, 1041.
3 Jur. Styles (5th ed.), i. 112; Bell's Lect. ii. 844.
4 Bell's Lect. ii. 843.
5 See M'Laren, i. 606.
6 M'Laren, i. 609, and cases there cited; *Ferguson*, 2 R. 627; see further H.R. 559 *et seq.*
7 Ersk. 3, 8, 36; Stair, 2, 6, 10; 3, 5, 51; 1 Bell's Com. 54; Bell's Lect. ii. 834; Fraser, ii. 1428.

gives equal rights to the husband and the wife, the subject being vested in them jointly during their lives, with the benefit of survivorship in favour of the longer liver.[1]

(2) To spouses in conjunct fee and liferent.

(2) Under destinations to spouses *in conjunct fee and liferent* the husband is, as a general rule, presumed to be fiar, and the wife has merely a liferent of the subjects, contingent on her being the survivor of the spouses.[2]

(3) To spouses in conjunct fee and liferent, the property being the wife's.

(3) If, however, the subject of a destination in favour of spouses in conjunct fee and liferent comes from the wife or her relations, is not in name of tocher,[3] and has not been acquired by the husband by purchase,[4] the wife will be deemed fiar, and the husband a mere liferenter.[5]

(4) To spouses in conjunct fee and liferent, the heirs of one being favoured under the destination.

(4) In the case of property coming from a third party, and destined to spouses in conjunct fee and liferent, the spouse whose heirs are most favoured in the destination, *i.e.*, are called first after heirs of the marriage, has, in certain cases, been held to be fiar.[6]

(5) To spouses, the subject being tocher.

(5) Although the property to which a destination in favour of spouses in conjunct fee and liferent applies comes through the wife, or from her relations, the fee will be in the husband if the estate was granted as tocher, or was given to him in consideration of provisions made by him in her favour, even although her heirs are most favoured in the destination.[7]

(6) To spouses, one of whom has absolute power of disposal.

(6) Under destinations to spouses in conjunct fee and liferent the fee is, *in dubio*, in the spouse who has an absolute power of disposal, as opposed to a mere faculty, in certain events, to sell or burden.[8]

[1] *Walker*, 23 R. 347; but see Bell's Lect. ii. 834; Fraser, ii. 1428.

[2] Bell's Lect. ii. 834; Fraser, ii. 1428; Ersk. 3, 8, 36; Stair, 2, 6, 10; 1 Bell's Com. 54.

[3] Fraser, ii. 1432; Bell's Lect. ii. 834; 1 Bell's Com. 55; Ersk. 3, 8, 36.

[4] Fraser, ii. 1430; *Fisher's Trs.*, 7 D. 129.

[5] Fraser, ii. 1429; Bell's Lect. ii. 834; 1 Bell's Com. 54; Stair, 3, 5, 51; Ersk. 3, 8, 36; Lord Benholme's Note in *Myles*, 19 D. 408; and Lord Justice-Clerk Moncreiff in *Brough*, 14 R. 858; *Smith Cunninghame*, 7 M. 689.

[6] Fraser, ii. 1431; 1 Bell's Com. 54; Bell's Lect. ii. 836; Ersk. 3, 8, 36.

[7] Fraser, ii. 1432; Bell's Lect. ii. 834; 1 Bell's Com. 55; Ersk. 3, 8, 36.

[8] Fraser, ii. 1434; Bell's Lect. ii. 835; Ersk. 3, 8, 36; Stair, 2, 6, 10; 3, 5, 51.

(7) Under destinations (*a*) to spouses in fee, and the survivor of them and the heir of the survivor, or (*b*) to them in conjunct fee and liferent (or in conjunct liferent), and to the longer liver, *and the heirs of the longer liver*, or (*c*) to them and the longer liver, *and their heirs and assignees*, the husband, on survivance, is fiar, although the fee was in the wife during the subsistence of the marriage, and, conversely, the wife on survivance is fiar, although the fee was in the husband during the subsistence of the marriage.[1] (7) To spouses in conjunct fee and liferent, and the longer liver and their heirs.

(8) Under a destination to spouses in conjunct fee and liferent, or in conjunct liferent, and to the longer liver, and to the *heirs of the marriage*, the fee remains in the spouse who had it during marriage.[2] (8) To spouses in conjunct fee and liferent, and the longer liver and the heirs of the marriage.

(9) A destination in a conveyance by one spouse to both spouses in conjunct fee and liferent, for their liferent use allenarly, and to the heirs of the marriage in fee, whom failing, to the heirs whatsoever of either or both the spouses, gives no more than a *spes successionis* to the heirs whatsoever, and, in the event of there being no heirs of the marriage, leaves the fee in the granter.[3] (9) To spouses in conjunct fee and liferent, for their liferent use allenarly, and to the heirs of the marriage in fee, whom failing, to the heirs whatsoever of either or both of the spouses, the granter being one of the spouses.

VII. Destinations to Parents and Children.—The rules applicable, in the absence of an expression of a contrary intention, to the construction of destinations in favour of parents and children[4] are as follows:—

(1) As regards destinations to parents and children, either in conveyances granted by third parties or in deeds intended to receive instant effect—*e.g.*, marriage-contracts—the presumption is that the fee is in the parent and that the children are merely substitutes. (1) Presumption,—parent fiar.

(2) Under destinations in such deeds in favour of parents in liferent and their children unnamed, whether born (2) A in liferent and children in fee.

1 Fraser, ii. 1435; Ersk. 3, 8, 36; Bell's Lect. ii. 836; 1 Bell's Com. 54; and see *M'Gregor*, 9 S. 675, aff. 1 S. & M'L. 441, 3 Ross' L.C. 733; *Nasmyth*, 4 Br. Sup. 204; *Lord Boyd*, M. 4205; 5 Br. Sup. 777; case (1635) mentioned in *Falconer*, M. 3845.

2 Fraser, ii. 1436; Bell's Lect. ii. 836; *Madden*, 4 D. 749, 3 Ross' L.C. 723.

3 *Wilson*, 6 S. 198, 3 Ross' L.C. 754.

4 See 3 Ross' L.C. 602 *et seq.*; Fraser, ii. 1440; Bell's Lect. ii. 837; 1 Bell's Com. 55; More's Notes on Stair, ccxii.; M'Laren, i. 607 *et seq.*; Duff, 393.

or unborn, or their heirs, in fee, the right of fee is in the parents, and a mere *spes successionis* in the children or the heirs, as the case may be.[1]

(3) To A and B (spouses) and the longer liver in liferent and children in fee, granter being one of the spouses.

(3) Under a destination made by either a husband or a wife in favour of themselves and the longer liver in liferent, and to the children of the marriage in fee, a right of fee is not conferred on the survivor of the spouses, but the fee is left untransferred in the maker of the destination;[2] and nothing more is conveyed to the other spouse than a liferent. In short, however fixed may be the rule that under a disposition from a third party to parents in liferent, and children *nascituris* in fee, an absolute fee will vest in one of the parents, and leave nothing in the disponer, there is no authority, but the reverse, for applying that rule to the case of dispositions between the married persons themselves, or by the friends of one to them both jointly. With regard to such cases, the fee will remain with that spouse to whom it originally belonged, or through whom it came.[3]

(4) To A in liferent and B (child) in fee.

(4) Destinations to a parent in liferent and a child *nominatim* in fee import a liferent in the parent and a fee in the child.[4]

(5) To A and B (child) in fee.

(5) Under destinations to a parent and his children in fee, the children are considered, not joint disponees with their parent, but mere substitutes to him.[5]

(6) To A in liferent allenarly and children or issue to be born in fee.

(6) Under a destination to a parent in liferent, for his liferent use *allenarly* (or under restrictive words of similar signification),[6] and to his children or issue to be born in fee, or to his heirs, he has a right of liferent, and a fiduciary fee for his children or issue, or

[1] Fraser, ii. 1442; Bell's Lect. ii. 837; More's Notes on Stair, ccxii.; 3 Ross' L.C. 602; M'Laren, i. 608, and cases there cited.

[2] *Mackellar*, 3 D. 172, 3 Ross' L.C. 741; *Jameson*, 13 S. 318.

[3] See Bell's Lect. ii. 842; M'Laren, i. 608.

[4] *M'Intosh*, 28th Jan. 1812, F.C.; *Spence*, 5 S. 17, aff. 3 W. & S. 380; M'Laren, i. 607.

[5] *Edward and Others*, 10 D. 685; *Grant*, 11 S. 484.

[6] *E.g.*, only, or alimentary, or merely; or if the deed as a whole clearly shows an intention to restrict the parent's beneficial right to a liferent; see *Newlands*, M. 4289, aff. 4 Pat. 43; *Douglas*, Hume 173; *Kennedy*, 3 S. 554; *Gerran*, M. 4402; *Dawson*, 4 R. 597; and see *Fenton Livingstone*, 1 F. 831.

his heirs, as the case may be.[1] The fee vests in the children or issue as they come into existence,[2] and in the heir as at the date of the death of the fiduciary fiar, because till then the heir cannot be determined.[3] Vesting, however, will be postponed until the date of the parent's death, when the fee is destined to him in liferent allenarly, and to his children or the survivors or survivor of them in fee.[4]

(7) When trustees are directed *to make over* an estate to a beneficiary in liferent and to his children in fee, the fee vests in the beneficiary;[5] but when trustees are directed *to hold* for a beneficiary in liferent and his children in fee, the children are the fiars.[6]

(7) Direction (*a*) to make over to, or (*b*) to hold for, A in liferent and children in fee.

(8) Under a destination to one in liferent and the children of another in fee, the former has for himself simply a liferent.[7]

(8) To A in liferent and B's children in fee.

(9) When a parent conveys to himself in liferent and to his child *nominatim* in fee, or to himself and his spouse and the survivor in liferent and to their child *nominatim* in fee,[8] or takes a conveyance in similar terms under reservation of power to himself to sell or burden, the child is disponee of the fee, and does not require to serve as heir to his father;[9] whereas a conveyance to a husband and wife in conjunct fee and liferent, for the wife's liferent use allenarly, and to their child *nominatim* in fee, imports a right of fee in the father, and the child is a mere substitute.[10]

(9) To A and B (spouses) and the survivor in liferent, and to C (child) in fee, granter being one of the spouses.

To A and B (spouses) in conjunct fee and liferent, for B's liferent use allenarly and C (child) in fee.

[1] *Newlands*, M. 4289, aff. 4 Pat. 43; *Thomson*, 1 Dow 417, 5 Pat. 654; *Harvey*, 26th May 1815, F.C.; *Allardice*, Bell's Fol. Ca. 156; *Napier*, 2 W. & S. 550; *Dixon*, 6 W. & S. 431; *Thomsons*, M. 4258; *Watherstone*, M. 4297; *Maxwell*, 15 S. 291, aff. M'L. & R. 790; *Simpson*, 2 F. 447; see Bell's Lect. ii. 839; M'Laren, i. 609; Fraser, ii. 1443; 3 Ross' L.C. 634.

[2] *Douglas*, 8 M. 374; *Otto*, 9 M. 660; *Spence*, 5 S. 17, aff. 3 W. & S. 380; *Beattie's Tr.*, 24 D. 519; *Ramsay*, 16 D. 764; *Napier*, 2 W. & S. 550; *Black*, 8 R. 497.

[3] *Ferguson*, 2 R. 627; *Maule*, 3 R. 831; *Todd*, 1 R. 1203; *Gollan's Trs.*, 3 F. 1035.

[4] *Snell*, 10 M. 745; and see *Fergus, etc.*, 10 M. 968.

[5] *Beveridges*, 5 R. 1116; *Hutton*, 9 D. 639; *Ferguson's Trs.*, 22 D. 1442, aff. 4 Macq. 397.

[6] *Ross*, 9 D. 1327; *Mackie*, 10 R. 746, rev. 11 R. (H.L.) 10; *Seton*, M. 4219; *Ramsay*, 16 D. 764; *Watson*, 16 D. 803; *Douglas*, Hume, 173; see Bell's Lect. ii. 840; M'Laren, i. 611; Fraser, ii. 1449, 1481.

[7] *Ramsay*, 16 D. 764.

[8] *M'Intosh*, Jan. 28, 1812, F.C.

[9] *Cumming*, M. 4268, 15,854; *Baillie*, Feb. 23, 1809, F.C.; *Rusco's Cr.s*, M. 4117.

[10] *Wilson*, Dec. 14, 1819, F.C., 3 Ross' L.C. 716; see Bell's Lect. ii. 838.

CHAPTER II

CONTRACTS OF MARRIAGE, RELATING CHIEFLY TO HERITABLE PROPERTY

Leading object of marriage-contract.

THE purpose of contracts of marriage is the settlement of provisions in favour of the spouses and the children to be born of the marriage, and the securing of such provisions against future acts of the spouses or the diligence of their creditors. Contracts of marriage are of two sorts—(1) antenuptial, and (2) postnuptial.

Parts of marriage-contract (*a*) when no trust.

ANTENUPTIAL CONTRACTS.—Where no trust is created, an antenuptial contract of marriage usually consists of the following parts:—I. Narrative clause, containing the names and designations of the parties, and usually an undertaking to solemnise the marriage in usual form. II. Disposition of husband's estate, usually to himself and a certain series of heirs. III. Provisions to the wife and younger children. IV. Disposition of wife's estate, usually to the husband and his heirs. V. Acceptance by spouses of provisions in lieu of legal rights, and declaration that children are to have no claim to legitim. VI. Appointment of trustees to see obligations in marriage-contract implemented. VII. Registration clause. VIII. Testing clause.[1]

(*b*) When trust.

It is very common in practice to create a marriage-contract trust in order to secure provisions against the husband's debts and deeds, and to protect the funds of the wife from being given by her to her husband. When a contract of marriage is constituted by a trust, the deed generally consists of the following parts:—I. Narrative clause. II. Disposition by husband to trustees of estate, heritable or moveable, or both, with assigna-

[1] See Jur. Styles (5th ed.), i. 175 *et seq.*; (6th ed.), i. 654 *et seq.*

tion to writs and rents. III. Declaration of the trust purposes for which husband's estate is to be held. IV. Disposition by wife to trustees of estate, heritable or moveable, or both. V. Declaration of the trust purposes for which wife's estate is held. VI. Powers to trustees regarding investment, advances to children, sale of estate, etc. VII. Declaration that provisions to spouses and children are to be in full of legal rights. VIII. Declaration that action and execution shall pass at instance of trustees. IX. Clause of registration for preservation and execution. X. Testing clause.[1]

Dispositive Clause, etc.

By the dispositive clause or clauses and the clauses setting forth provisions in a marriage-contract the heir of the marriage may have either (*a*) a *spes successionis in obligatione*, or (*b*) a *jus crediti*, or (*c*) a preference to, or a fee in, the estate.

(*a*) Right of heirs of marriage.

The husband sometimes dispones heritable estate, without the intervention of a trust, to himself, whom failing, to a series of substitutes, *e.g.*, to himself and the heirs-male of the intended marriage, whom failing, to the heirs-male of his body by any subsequent marriage, whom failing, to the heirs whomsoever of the intended marriage. Under this or a similar destination the husband is institute and fiar, but the heirs-male and the heirs whomsoever of the intended marriage, although only called as substitutes, have a *spes successionis in obligatione*, as opposed to a mere *spes successionis in destinatione*.[2] The heirs-male of the body of the institute by any *subsequent* marriage have merely a *spes successionis in destinatione*. The reason of the difference is that the marriage-contract is deemed onerous *quoad* the heirs of the marriage called in the destination, but gratuitous *quoad* other substitutes.[3] In consequence of the *spes successionis in obligatione* in the heir of the marriage, the parent cannot burden the estate or evacuate the destination for gratuitous consideration,[4] nor can he restrict the heir's right to an annuity or a liferent,[5] or affect it with the fetters of an entail.[6] Any assignation by an heir of his *spes* under a destination in a marriage-

Spes successionis in obligatione.

Spes successionis in destinatione.

Effect of such *spes*.

1 Jur. Styles (5th ed.), i. 209 *et seq.*; (6th ed.), i. 697 *et seq.*

2 See p. 197, *supra*.

3 See *Craik*, M. 4313; *Wilson*, 6 S. 198, 3 Ross' L.C. 754; *Barclay's Trs.*, 5 F. 926.

4 *Graham*, M. 13,010; *Grahame*, 2 S. 612; *Gillon's Trs.*, 17 R. 435; *Livingstone*, 1 F. 831.

5 *Ormiston*, Hume, 531.

6 *Watson*, M. App. "Provisions to Heirs and Children," No. 4.

contract will carry nothing if he should die before the succession opens to him;[1] and, as his *spes* imports no *jus crediti*, he cannot use inhibition or other diligence against his father to restrain him from exercising his rights as fiar.[2]

Reservation by parent of power to evacuate destination gratuitously.

The father may quite competently reserve full power in his marriage-contract to burden the estate or evacuate the destination even for gratuitous consideration, or to entail it.[3] In other words, he may prevent the substitutes called in the destination from having more than a *spes successionis in destinatione*.

Heirs not of marriage have usually no more than ordinary *spes*.

The heirs, other than the heirs of the marriage, have no more than a *spes successionis in destinatione*, which may be defeated onerously or gratuitously[4] unless the contract shows that it was *pars contractus* that such substitutes should have more than a *spes successionis in destinatione*.[5]

Rights of the heir-presumptive of the marriage in virtue of *spes*.

Although the heir of the marriage cannot be known until the dissolution of the marriage, yet the eldest son, being the presumptive heir, although he has no more than a *spes successionis in obligatione*, has the following powers (unless they are taken from him by the terms of the marriage-contract)[6] during the subsistence of the marriage—(1) To discharge, for himself and his successors, the *spes successionis in obligatione* which he has under the marriage-contract;[7] or (2) to accept a propulsion of the fee, with or without conditions attached;[8] or (3) to consent to a conveyance of the estate to a stranger for gratuitous consideration.[9]

Powers of heir on succeeding to estate.

When the heir of the marriage obtains the estate either by propulsion or by succession he is absolute fiar, and can alter the order of succession even by gratuitous deed.[10]

(*b*) When the heir of the marriage has a *jus crediti*.

The heir of the marriage may have more than a *spes successionis in obligatione* in the estate disponed; he may have a *jus crediti*, which entitles him to compete with his father's ordinary

1 *Browning*, 15 S. 999; *Maconochie*, M. 13,040.

2 *Gordon*, M. 4398, aff. 1 Pat. 493.

3 *M'Donald*, 4 R. 271.

4 *Wilson*, 3 S. 430; *Edgar*, M. 4325; *Craik*, M. 4313; *Wilson*, 6 S. 198, 3 Ross' L.C. 754; *Craigie*, 15 S. 1157.

5 See p. 197, *supra*.

6 See *Haig*, 19 D. 449.

7 *Routledge*, May 19, 1812, F.C.; *Majendie*, Dec. 16, 1819, F.C., aff. 2 Bligh's App. 692; *Moodie*, 1 Pat. 20.

8 *Fotheringham*, M. 12,991; *Trail*, M. 12,985; *Bonar*, M. 12,976.

9 Bell's Prin. 1972.

10 *Wilson*, 6 S. 198, 3 Ross' L.C. 754; *Edgar*, M. 4325.

creditors,—a right which a *spes successionis*, either *in obligatione* or *in destinatione*, does not give. Thus, an obligation by a parent in his contract of marriage to infeft the heir in lands *de presenti*, or against a determinate day, or a determinate age, or a clause restricting his own right to his lands to a liferent allenarly, and conferring a fee on the heir (although the disposition containing such a clause is not followed by infeftment) will give the heir a *jus crediti*.[1]

(c) Where heir of marriage has a fee or preference.

The father's right will be restricted to a liferent—(1) if he disponed to himself in liferent allenarly, or only, or alimentary, or merely, or under restrictive words of similar signification, and to the heirs of the marriage in fee;[2] or (2) if he conveys to trustees to hold for himself in liferent and the heirs of the marriage in fee.[3] Infeftment in full terms of the destination in (1) will divest the father of the proprietary fee; and infeftment in favour of the trustees in (2) will invest them with the fee. (3) Besides, if a *jus crediti* is secured by proper and preferable diligence, the heir of the marriage will have a preference in a question with creditors.[4]

If a parent infeft in lands disponed them to himself in liferent only, and to the heirs of his marriage in fee, it is necessary that infeftment should be taken in full terms of the destination (as opposed to the extent of the liferent) in order to divest him of the fee, and to constitute him, in a question with his creditors, merely a fiduciary fiar.[5] Where, however, property is destined by another to a parent in liferent only and to the heirs of his marriage in fee (or in other terms importing that the parent is to have no more than a fiduciary fee),[6] the parent in such a case is simply a fiduciary fiar, and his creditors cannot attach the fee, whether infeftment has or has not followed to any extent on the disposition.[7]

(2) A question which frequently arises in construing a marriage-contract is, what estate is carried by the conveyance contained in it?

[1] Ersk. 3, 8, 40; Fraser on Husband and Wife, ii. 1421; Bell's Lect. ii. 883.

[2] See *Newlands*, M. 4289, aff. 4 Pat. 43, 3 Ross' L.C. 634; *Maule*, 3 R. 831; Bell's Lect. ii. 885.

[3] *Seton*, M. 4219; *Ross*, 9 D. 1327; Bell's Lect. *ibid.*

[4] See *Douglas*, M. 12,910; *Lyon*, M. 8150.

[5] *Falconer*, 3 S. 455 (n.e. 317); see also *Dundas*, 2 S. 145 (n.e. 133).

[6] See *Fenton Livingstone*, 1 F. 831.

[7] *Newlands*, M. 4289, aff. 4 Pat. 43.

Conveyance of property belonging to spouse at date of contract and date of death.

In an antenuptial marriage-contract one of the spouses may convey to trustees all property belonging to him or to her at the date thereof, and also all property which may belong to him or to her at the date of his or her death. Such a conveyance carries property actually belonging to the disponer at either of these dates, including a *spes successionis* in the disponer at the former date, if that be the fair construction of the contract as a whole. It does not, however, deprive him or her of any right of property in, or power of control (including power to burden with debt) over, subjects which he or she may acquire after the date of the marriage-contract.[1]

Conveyance of *acquirenda*.

There is often, especially on the part of a wife, a general conveyance of *acquirenda* during the subsistence of the marriage. Such a conveyance does not cover life interests and annuities or savings from income to which a married woman becomes entitled during marriage, because such a clause is read as referring only to principal sums, unless the contract clearly requires a different construction.[2] It will, however, include a provision of property to which the spouse has an absolute right of fee, although the testament leaving the provision expressly declares that it is not to fall under the marriage-contract.[3] The party who makes a conveyance of *acquirenda* can only be restrained from acts of gratuitous alienation which will prejudice the heirs of the marriage, unless he or she has bound himself or herself to infeft trustees in such *acquirenda*, in which case he or she can retain no right of property in, or power of control over, the subjects.[4] Sometimes instead of *acquirenda* generally it is "conquest" which is assigned. Conquest includes whatever is acquired, whether heritable or moveable, during the marriage by industry, economy, or purchase from funds acquired after marriage, but it does not include legacies, donations, or what is acquired by succession, either as heir or as executor.[5]

Provision of conquest.

[1] *Wyllie's Trs.*, 18 R. 1121; and see *Grant's Trs.*, 13 R. 646; *Dowie*, 21 R. 1052.

[2] *Boyd's Trs.*, 4 R. 1082; *Young's Trs., etc.*, 12 R. 968; *Neilson's Trs.*, 24 R. 1135; *Neish's Trs.*, 24 R. 306; *Hunter*, 4 S.L.T. 36; *Dunbar's Trs.*, 5 F. 191, aff. 7 F. (H.L.) 92.

[3] *Simson's Trs.*, 17 R. 581; following *Douglas' Trs.*, 7 R. 295; overruling *Thurburn's Trs.*, 3 M. 134; and see *Campbell*, 1 F. 999 (where legacy designed to exclude marriage trust).

[4] See Lord M'Laren in *Dowie*, 21 R. 1052, at p. 1058; *Hagart's Trs.*, 22 R. 625.

[5] See as to power of husband over conquest, Fraser, ii. 1413; *Anderson*, M. 12,890; Lord Curriehill in *Champion*, 6 M. 17.

A conveyance of *acquirenda* in favour of marriage-contract trustees will not carry property acquired after the dissolution of the marriage, in the absence of words clearly assigning *acquirenda* after that event.[1]

Provision of annuity, and security therefor.

(3) An annuity to a wife in a marriage-contract may be heritably secured (*a*) by the imposition of the annuity as a real burden in the clause of the contract disponing the lands; (*b*) by the imposition of the annuity as a real burden in the dispositive clause, and by a disposition in the same deed of the annuity itself payable furth of certain lands described, and an assignation of the writs and rents of such lands, but only so far as necessary to make effectual the annuity. If the annuity is simply made a real burden on the lands the disponee's infeftment setting forth the burden will create a security for the annuity; but if the contract specially dispones an annuity furth of the lands to the wife, the contract, to give full effect to the disposition of the annuity, must be recorded, or a notarial instrument expede thereon and recorded, with a warrant of registration in favour of the wife. Further, (*c*) a husband may grant a bond of annuity and a disposition in security thereof, which may form part of the marriage-contract.[2]

Locality lands.

A fee-simple proprietor sometimes grants to his wife a jointure or liferent of his heritable estate, or part of it, and in this case the lands burdened with the liferent are called locality lands.[3]

Whether provisions to wife and children confer preference, *jus crediti*, or only a *spes successionis*.

(4) It has already been shown in what circumstances the heir of the marriage has a preference or *jus crediti* to the heritable estate destined to him in a marriage-contract. Provisions by a husband to a wife in an antenuptial contract of marriage, not secured so as to confer a preference on her, give her a *jus crediti* entitling her to rank with her husband's creditors,[4] either absolutely or contingently, as the case may be. If,

[1] *Russell's Trs.*, 14 R. 849; *Wardlaw*, 7 R. 1066, and cases there cited; *Ramsay's Trs.*, 1 F. 495; *Coulson's Trs.*, 3 F. 1041; *Boyd's Trs.*, 7 F. 576.

[2] See Jur. Styles (5th ed.), i. 482, for form of bond of annuity and disposition in security; and on annuities see *Bell's Trustee*, 13 R. 1188 (annuity equal to "one-half" of rental); *Cameron*, 18 R. 728 (implied discharge of annuity); *Hutcheson's Trs.*, 13 R. 915 (insufficient funds to meet annuity); *Paterson*, 36 S.L.R. 507.

[3] Fraser, ii. 1425; Bell's Lect. ii. 866. For provisions which may be made under Entail Statutes to widow, etc., see H.R. 599 *et seq.*

[4] Fraser, ii. 1355.

however, the provisions are of the nature of a succession, she has no *jus crediti*.[1] Children, like spouses, may in respect of provisions in their favour have (*a*) a preference, (*b*) a *jus crediti*, or (*c*) merely a *spes successionis*. Children have a preference against creditors if there is a conveyance in trust for them in the marriage-contract, or in a deed granted subsequent to the marriage, but in implement of obligations in the marriage-contract, in respect of which the children have either a *jus crediti* or merely a *spes successionis*; and they have also a preference if a *jus crediti* is secured by proper diligence. When provisions in favour of children are payable after the death of the parent providing them, they confer only a *spes successionis in obligatione*,[2] unless they are the counterpart of an onerous obligation.[3] But provisions under marriage-contracts in favour of children will give them a *jus crediti* (*a*) if they be conceived so as to entitle the children to payment either of principal or of interest at a time which may happen during the parent's lifetime; (*β*) if they, although not payable till after the parent's death, are the counterpart of an onerous obligation, as, for example, the renunciation of legitim;[3] or (*γ*) if any conditions are adjected to them incompatible with a power in the parent to defeat them.[4]

Power of appointment.

(5) A parent has at common law a power of appointment among his children of a provision destined by him in a marriage-contract to them as *a class*. Although, when heritage is destined to heirs, it goes to the heir in heritage, and the parent cannot apportion it among all the children,[5] yet when it is destined to children or bairns, the parent can apportion it;[6] and when moveables are destined to heirs or children,[7] the parent has a power of apportionment. Notwithstanding this power of apportionment at common law, such a power is often reserved in a marriage-contract, in which case the reserved power super-

[1] *Grant*, 10 M. 804.
[2] Fraser, ii. 1357.
[3] *Gordon*, 11 S. 368.
[4] *Ballingall*, M. 12,919; *Jolly*, 2 S. 730 (n.e. 611); *Cruikshank's Trs.*, 16 D. 7; *M'Kenzie*, M. 12,924, and M. App. *voce* "Provisions to Heirs," No. 3; Fraser, ii. 1358.
[5] See *Stewart*, 1 Pat. 364; *Ormiston*, Hume, 531; *Spiers*, M. 13,026.
[6] *Dowie*, M. 13,004; *Wilson*, M. 13,006; *Herries*, Hume, 528.
[7] *Grant*, 5 Br. Sup. 86; *Edmonston*, M. 13,002.

sedes the power at common law, and falls to be exercised according to the terms of the deed.[1] Prior to 30th July 1874, the entire exclusion of any one child, or the representatives of a deceased child, in whom a right had vested, nullified the appointment;[2] but by an Act passed in that year it was provided that such exclusion should not have this effect.[3]

Provisions for second marriage.

(6) A parent may reserve a power to grant provisions to a second spouse, and the children of a second marriage. It is, however, competent for him, apart from such reserved power, to make reasonable provisions for them, out of estate already settled on the children of the first marriage, at least if they have no *jus crediti* over the estate so settled, and the parent has no other funds to satisfy the provision.[4] Similarly, if an estate is settled by a spouse in the contract of a second marriage, that spouse may burden the heir of the second marriage with rational provisions in favour of children of the first marriage.[5]

Vesting under marriage-contracts.

(7) The rules regulating the period of vesting are generally the same in the case of marriage-contracts as in the case of testamentary deeds. But (1) *in dubio* provisions in marriage-contracts, which are not secured, vest at the dissolution of the marriage;[6] (2) where estate is conveyed for behoof of children to be born of the marriage, vesting therein takes place in them as they come into existence;[7] and (3) where a parent has bound himself by antenuptial contract of marriage to pay certain sums for the children to be born of the marriage, vesting also takes place in them as they are born,[8] unless the deed directs or implies a different period of vesting.

Exclusion of legal rights.

In an antenuptial contract of marriage there should be inserted a clause declaring that the conventional provisions are in full, or exclusive of, the legal rights of parties. The old statute 1681, c. 10, enacts that where a provision is made for a

[1] Fraser, ii. 1368. As to whether power has been exercised, see *Brodie's Jud. Fact.*, 2 F. 1105; effect on accrescing shares, see *Stirling's Trs.*, 1 F. 215.

[2] *Watson*, 15 S. 586; *Campbell*, 5 R. 961; *Campbell*, 5 Br. Sup. 683.

[3] 37 & 38 Vict., c. 37, s. 1, which applies to Scotland; *Mackie*, 12 R. 1230.

[4] *Haldane*, 13 R. 179; and see *Lowden's Trs.*, 8 R. 741; *Guthrie*, 9 D. 124; *Arthur and Seymour*, 8 M. 928.

[5] *Cowan*, M. 12,942; *Robson*, M. 3050; *Murrays*, M. 12,944.

[6] *Grant's Tr.*, 4 M. 336; *Rogerson's Trs.*, 3 M. 684.

[7] *Beattie's Tr.*, 24 D. 519.

[8] *Walkinshaw's Trs.*, 10 M. 763.

wife by a contract or other deed, either before or after marriage, she shall thereby be excluded from terce; but she may get both where that appears to be the husband's intention.[1] The Act of 1681, c. 10, does not apply to courtesy, and this is not discharged by a conventional provision, unless the provision is made expressly or by implication in lieu of it.[2] *Jus relictæ*,[3] *jus relicti*,[4] and legitim[5] may be discharged by implication, but the implication must be clear to that effect. An exclusion of the *jus mariti* and right of administration in an antenuptial contract of marriage, although entered into prior to 1881, will not exclude *jus relicti*;[6] but if a husband claims a liferent of his wife's estate under either an antenuptial contract of marriage or other deed, he is not entitled to *jus relicti*.[7]

Execution of marriage-contracts.

If one of the parties to an antenuptial contract is a minor, his guardian ought to consent to it; but if a minor who is domiciled in Scotland makes, without consent of his curators, a reasonable provision in favour of his spouse and children in an antenuptial contract of marriage, it will be sustained.[8]

Although an antenuptial contract of marriage is executed informally, a marriage following on the faith of the contract will validate the contract *rei interventu*.[9] An antenuptial contract, however formally executed, may be revoked before the solemnisation of the marriage.

Revocation of marriage-contract.

There is often a desire to revoke a contract of marriage after the marriage has been celebrated. The rule with regard to revocation is (*a*) that when the trust conveyance has been executed with the intention of securing a provision in favour of a wife in the event of her surviving the husband, the trust is irrevocable *stante matrimonio*;[10] but (*b*) that, where there is no

[1] *Ross*, M. 4631, rev. (H.L.) 3 Pat. 621; M. *voce* "Foreign," App. No. 5.

[2] *Primrose*, M. App. *voce* "Courtesy," No. 1.

[3] See Moveable Rights, p. 408.

[4] *Ibid.* 409; *Murray's Trs.*, 3 F. 820. On exclusion of legal rights, see *Lyon's Trs.*, 5 F. 1096; *Dunbar*, 5 F. 191; *Craigie's Trs.*, 6 F. 343.

[5] See Moveable Rights, p. 400.

[6] *Fotheringham's Trs.*, 16 R. 873; *Simons' Tr.*, 18 R. 135.

[7] *Buntine*, 21 R. 714; and see *Simons' Tr.*, *supra*.

[8] *Davidson*, M. 8988; *Bruce*, 17 D. 265; and see *Douglas' Trs.*, 7 R. 295.

[9] *Lang*, 16 R. 590.

[10] *Menzies*, 2 R. 507; *Halkett*, 17 R. 719; *Edwardes*, 18 R. 319, rev. 19 R. (H.L.) 33; *Williamson*, 17 R. 927; *Montgomery's Trs.*, 15 R. 369; *Eliott's Tr.*, 21 R. 975; *Ker's Trs.*, 23 R. 317; *Reid*, 1 F. 969; and see *Robertson*, 19 R. 849; *Murray*, 22 R. 927; *M'Lay*, 1 F. 804; *Lyon*, 3 F. 653; *Wilken's Trs.*, 6 F. 655.

matrimonial purpose to be served by the continuance of the trust, the trustees may be ordained, even *stante matrimonio*, to denude themselves of the trust-estate.[1] If trustees are ordained to hold funds for the alimentary liferent of a person, they cannot denude themselves of them, even at the request of the liferenter.[2] Where marriage-contract trustees are bound to hold a trust-estate *stante matrimonio* for payment of an alimentary annuity to a wife in the event of her surviving her husband, they are not entitled to purchase with the trust funds an annuity in their names, payable to the wife contingently on her surviving her husband; for the security of the trust funds is greater than that of a purchased annuity, and a purchased annuity, not being protected by a trust, can be alienated by the wife.[3]

Postnuptial marriage-contracts.

POSTNUPTIAL MARRIAGE-CONTRACTS.—A postnuptial marriage-contract has, if its provisions are reasonable, generally the same effect *intra familiam*[4] as an antenuptial marriage-contract. One difference may be noted—the parties may more easily be allowed to revoke the deed, as the wife is just as free to discharge the provisions as she was to accept them.[5] With regard to creditors it has not the same effect. It appears that before a *jus crediti* against a husband's creditors can be conferred on a wife by the provisions in a postnuptial contract these circumstances must concur:—(1) There must be no antenuptial marriage-contract in which a suitable provision has been made for her.[6] (2) The provisions must not be revocable by the husband at any time.[7] (3) The provisions must be moderate, rational, and suitable to the husband's circumstances. (4) The provisions must not be payable during the subsistence of the marriage.[8] (5) The husband must, it is thought, be solvent when the contract is made. It cannot, however, be said to be

1 *Ramsay*, 10 M. 120; *Newlands*, 9 R. 1104; *Laidlaws*, 11 R. 481; *Grant*, 3 R. 280; *M'Lean's Trs.*, 5 R. 679.

2 *Eliott's Tr.*; *Edwardes*; *Montgomery's Trs.*; *Reid*, *supra*; *Graham's Trs.*, 1 F. 357; *Wilken's Trs.*, *supra*.

3 *Ker's Trs.*, 23 R. 317; but see *Graham's Trs.*, 1 F. 357; and *Parlane's Trs.*, 4 F. 805.

4 *Peddie*, 18 R. 491; *Low*, 5 R. 185; and see *Buchanan's Trs.*, 17 R. (H.L.) 53; *Barras*, 2 F. 1094.

5 *Gillon's Trs.*, 5 F. 533.

6 *Galloway*, 4 Macq. 267; and see Ersk. 1, 6, 30; *Rae*, 2 R. 676; *Melville*, 6 R. 1286.

7 *Honeyman and Wilson*, 14 R. 163.

8 See *Dunlop*, 3 M. 758, aff. 5 M. (H.L.) 22; *Miller*, 10 M. 107, aff. 2 R. (H.L.) 62; and other cases cited in Fraser, ii. 1501; *M'Bain*, 3 F. 359; *Anderson*, 5 F. 323.

definitely decided that a reasonable provision payable to a wife during the subsistence of the marriage is invalid.[1] Provisions under postnuptial contracts have been sustained where the husband making them was insolvent;[2] but the decisions in these cases, none of which are recent, have been condemned as opposed to principle, and it is thought that they would not now be followed.[3]

Postnuptial provisions in form of unilateral deed.

A parent who is solvent may make provisions in favour of a child, either by means of a trust or otherwise. Postnuptial provisions to a spouse or to children do not require to take the form of a contract.

Legitim not defeated by postnuptial provisions.

Legitim cannot be defeated by provisions in postnuptial contracts without the consent of the child entitled to it, nor can the children of a first marriage be ousted from their right to legitim by the provisions of an antenuptial contract of marriage entered into on the second marriage of their parent.[4]

Granter infeft.

Completion of Titles under Marriage-Contracts.—When the granter is infeft in the lands conveyed in a marriage-contract, a feudal title to them under the marriage-contract can be made up in favour of the grantees in different ways. If the lands are described by (*a*) general description; or (*b*) particular description; or (*c*) description by statutory reference; or (*d*) description by general name, in terms of section 13 of the Titles to Land Consolidation Act, 1868,—either the contract of marriage may be recorded with a warrant of registration in the appropriate Register of Sasines, or a notarial instrument may be expede and recorded with a warrant.[5] If the contract of marriage contains a clause of direction, the warrant of registration may or may not refer to it. If it does refer to it, then the parts of the contract directed to be recorded, and the clause of direction, the testing clause, and the warrant of registration will alone appear on the register.[6] If a notarial instrument is expede on a contract containing a clause of direction, the notarial instrument must narrate the parts directed to be

[1] See *Rust*, 3 M. 378, and compare *Dunlop*, 3 M. 758, aff. 5 M. (H.L.) 22; Fraser, ii. 948.

[2] See, for example, *Campbell*, M. 988.

[3] See Fraser, ii. 1502; Goudy on Bankruptcy, p. 31.

[4] *Bishop's Trs.*, 21 R. 728.

[5] Ss. 15, 17.

[6] S. 12.

recorded.[1] If the lands conveyed are only described (*a*) in general terms, or (*b*) by reference not in statutory form, it is necessary, in completing a title, to expede and record a notarial instrument.[2]

When granter not infeft.

If the granter is not infeft, but has an unfeudalised title, the marriage-contract is treated as an assignation, and a title can be made up by the grantees by recording a notarial instrument.[3]

When granter has personal right.

If the granter has a personal right in the sense of section 9 of the Conveyancing Act, 1874, the grantees under the marriage-contract can make up a title by using the procedure prescribed in section 10 of that Act.

[1] S. 12. [2] S. 19. [3] S. 23.

CHAPTER III

TESTAMENTARY DEEDS RELATING CHIEFLY TO HERITABLE ESTATE

Law as to effectual conveyances *mortis causa* before 1868.

BEFORE the Titles to Land Consolidation Act, 1868, came into operation, the following were the chief rules of the law regarding *mortis causa* conveyances of lands:—(1) Lands could not be conveyed by testament or by any other deed which did not express a *de præsenti*[1] act of alienation by the use of the word "dispone."[2] (2) A *mortis causa* deed, although containing an expression of intention to convey lands, did not entitle the grantee to compel the heir of the testator to denude,[3] unless it contained the word "dispone."[3] (3) A gratuitous testamentary conveyance of land, although executed according to the laws of the country where it was made, if defective on account of the omission of proper dispositive words, or of any of the other solemnities required by the law of Scotland, did not constitute a ground of action against an heir to have him ordained to denude.[4] (4) A general disposition *mortis causa*, which contained *de præsenti* words of conveyance (*i.e.*, contained at least the *vox signata* "dispone"), but which did not contain the ordinary executive clauses, although it did not operate prior to 1858 as a valid conveyance of heritage, was yet sufficient to found an action against the heir of the granter to have him ordained to denude, or an action in implement of the conveyance.[5] (5) A writing declaring the heir in heritage to be disinherited had not this effect, if it did not convey lands to another.[6]

(1) "Dispone" *vox signata.*

(2) Effect of omission of "dispone."

(3) Effect of obligation to convey land valid in country where made but defective accord. to Scots law.

(4) Effect of omission of feudal clauses before 1858.

(5) Disinherison of heir.

[1] *Montgomery*, Bell's Fol. Cas. 203, 1 Ross' L.C. 7.

[2] *Kirkpatrick*, 11 M. 551, aff. 1 R. (H.L.) 37.

[3] *Kirkpatrick, supra.*

[4] *Crawfurd's Children*, M. 4486.

[5] *Glover*, Dec. 7, 1810, F.C.; *Welsh*, June 28, 1809, F.C.

[6] *Stoddart and Riddle*, Elchies, *voce* "Succession," No. 1.

The Titles to Land Consolidation Act, 1868, enacted:— (1) That it shall be competent to any owner of lands to settle the succession to the same in the event of his death, not only by conveyances *de præsenti*, but also by testamentary or *mortis causa* deeds or writings.[1] (2) That no testamentary or *mortis causa* deed or writing granted by any person alive at the commencement of the Act, or to be granted thereafter, shall be held to be invalid as a settlement of lands on account of the omission of the word "dispone," or other word or words importing a conveyance *de præsenti*.[1] (3) That where such deed or writing is not expressed in the terms required by the law existing before the Act for a conveyance of lands, but contains, with reference to lands, any word or words sufficient to bequeath moveables,[2] such deed or writing, if duly executed in the manner required or permitted in the case of any testamentary writing, is to be taken to be equivalent to a general disposition of the lands, creating an obligation upon the successors of the granter of such deed or writing to make up titles to the lands and to convey them to the grantee or legatee.[1] (4) That such grantee or legatee may complete his title to the lands by treating such deed or writing as a general disposition.[1] (5) That nothing contained in the Act shall be held to confer any right to such lands on the successors of any such grantee or legatee in the event of his predeceasing the granter, unless the deed or writing shall be so expressed as to give him such right in that event.[1]

Provisions and effect of Act of 1868 on testamentary conveyances of lands.

(1) Competent to bequeath heritage by testament.

(2) "Dispone" not essential.

(3) Intention to convey lands sufficient.

(4) How general disponee completes title.

(5) Case of grantee dying prior to granter.

A valid testamentary disposition of moveables could, even before 1868, be in these terms: "I leave all my moveable estate to A B." Since the commencement of the Act of 1868, the owner of moveable and heritable estate may make an effectual testamentary disposition thereof by simply using the following words:—"I leave all my estate, heritable and moveable, to A B."[2] The Act of 1868 put heritage in the same position as moveables when dealt with in a testamentary deed, and consequently direct words of conveyance are no longer essential in

Effect of Act of 1868 on form of testamentary conveyances of heritage.

[1] S. 20.

[2] See *Hardy's Trs.*, 9 M. 736, and other cases in H.R. n. 1, p. 608.

Words expressing intention to convey heritage still necessary.

a testamentary deed relating to heritage. But, if a testamentary deed is intended to convey lands, it must contain words not confined to moveables alone; it must contain words applicable to heritage, or at least show clearly that the testator intended to dispose of his whole estate, heritable as well as moveable. When

Equivocal words interpreted by context.

equivocal words are used in a testamentary deed it will be determined by the context whether or not the maker of the deed intended to bequeath heritage.[1] If a testamentary conveyance contains words which are *prima facie* applicable to moveables only, and no other meaning can, on account of the context, be ascribed to them, the deed will not convey heritage. Thus, a

"Effects."

deed bequeathing a person's "effects" has been held not to include heritage, because that word means, in its ordinary acceptation, moveables, more especially corporeal moveables.[2]

"Estate," or "means and estate."

The expression "estate," or "means and estate," is sufficient to carry both heritage and moveables, unless the context shows that the expression is applicable solely to moveables.[3]

When foreign will carries heritage.

By implication from section 20 of the Act of 1868, a foreign will, although not executed according to the formalities of Scots law, will be now sufficient to carry heritage in Scotland if it shows an intention on the part of the maker to convey his heritage.[4]

Notarial execution of testamentary deeds since 1st October 1874.

A testamentary writing relating to moveable estate could, prior to 1st October 1874, be executed for a person unable to write by one notary or by the minister of the parish before two witnesses, yet a testamentary deed relating to heritage required before that date to be executed by two notaries in the presence of four witnesses. Since 1st October 1874, however, a testamentary writing relating to moveable or heritable estate, or both, can be executed for a person unable to write by a notary or by a justice of the peace, or by a parish minister as a notary in his own parish, before two witnesses.[5] There is no express provision in the Conveyancing Act, 1874, to this effect as regards parish ministers, but schedule (I) contemplates that they

[1] *M'Leod's Trs.*, 2 R. 481; *Forsyth*, 15 R. 172.

[2] *Pitcairn*, 8 M. 604; *Griffith's Jud. Fact.*, 7 F. 470.

[3] *Grant*, 20 R. 404.

[4] *Studd*, 8 R. 249, aff. 10 R. (H.L.) 53.

[5] S. 41 and schedule I.

may execute in their own parishes "wills or other testamentary writings," and these words seem broad enough to cover testamentary writings relating to heritable or to both heritable and moveable estate.[1]

Law regarding disinherison.

The law still is that mere words of disinherison, in the absence of a conveyance to another, do not exclude the heir in heritage.

Formal testamentary deeds.

The subject of formal testamentary deeds may now be dealt with. A testator may leave his estate directly to beneficiaries, or to trustees in order that they may hold and distribute it as he directs. If the testator leaves his estate to a beneficiary without the instrumentality of a trust, his deed is very often in the form of a general disposition and settlement, containing the following clauses:—(1) Narrative clause; (2) dispositive clause, conveying his whole means, estate, and effects, heritable or moveable; (3) clause appointing his disponee to be his sole executor; (4) clause declaring that his disponee shall be bound to pay his debts and to pay specified legacies; (5) clause reserving power to revoke or alter the deed in whole or in part; (6) clause reserving the maker's own liferent; (7) clause dispensing with delivery of the deed; (8) clause of consent to registration for preservation; and (9) testing clause.[2] Where, however, a testator desires to make provision for various persons, or where his purposes cannot after his death be at once carried into effect, he generally makes a trust-disposition and settlement, consisting of the following parts:—

General disposition and settlement.

Trust-disposition and settlement.

I. Narrative clause.

I. Narrative Clause.

II. Disposition of estate.

II. Disposition of Estate to Trustees.—In a formal disposition and settlement, there is no reason why the heritable estate should not be described particularly or by reference in statutory form; but as the deed usually contains a description in general terms, there should be inserted a declaration that the particular description is not to prejudice the general conveyance of the testator's whole estate.

General and particular conveyance of heritage.

Estate over which granter has power of testing.

As a rule, a general conveyance *mortis causa* carries estate in which the granter is liferented with a power of testing on

[1] See 31 & 32 Vict., c. 101, s. 20.

[2] Jur. Styles, i. 596, 5th ed. 287.

the fee.[1] The deed may, however, show that the intention of the testator was not to exercise the power.[2]

Of powers of appointment.

In connection with powers of appointment, it may be observed (1) that a right of liferent and a power of disposal granted to another by the proprietor of an estate do not together constitute a fee,[3] unless the power of disposal is absolute and there is no contingent destination;[4] (2) that where the granter of the deed reserves to himself a liferent with a power of disposal, his right is that of fiar;[5] (3) that where there is a conveyance to one in liferent and to another in fee, with a power to dispone in the liferenter, (*a*) if infeftment is taken in terms of the destination, and the power of disposal is not exercised by the liferenter, the fiar named does not require to make up any new title on the death of the liferenter, and (*b*) if no infeftment is taken in favour of the fiar named during the lifetime of liferenter, and the liferenter dies without exercising the power of disposal, the fiar can complete a title as a disponee of the granter of the conveyance.[6]

Nominating survivors of trustees.

In nominating trustees it is usual to appoint them, or the survivors or survivor of them, to the office; but this nomination of survivors or survivor is implied.[7]

General disposition and real burden.

A real burden can be validly constituted by a notarial instrument in terms of Schedule (L) of the Act of 1868 following on a general disposition without a description of the lands conveyed.[8]

(1) Payment of debts.

III. Purposes of Trust.—(1) The first purpose of a trust-disposition generally contains directions for payment of the truster's debts. In the absence of a clear intention to the contrary, the heritable estate is primarily liable for heritable debts, and the moveable estate for moveable debts.[9]

Heritable debts.

[1] *Montgomery's Trs.*, 22 R. 824; *Clark's Trs.*, 21 R. 546; *Buchanan's Trs.*, 17 R. (H.L.) 53; *Gillon's Trs.*, 17 R. 435; *M'Tavish's Trs.*, 5 F. 641; *Tarratt's Trs.*, 6 F. 968; *Bray*, 8 F. 1078.

[2] *Mackenzie*, 1 R. 1050; *Whyte*, 16 R. 95.

[3] *Morris*, 15 D. 716, aff. 18 D. (H.L.) 42; *Alves*, 23 D. 712; and see *Miller*, 12 S. 31; *Reid*, 1 F. 969; *Douglas' Trs.*, 5 F. 69; *Miller Richard's Trs.*, 5 F. 909; *Peden's Tr.*, 5 F. 1014; *Tait's Trs.*, 6 F. 138.

[4] *Rattray's Trs.*, 1 F. 510, and the *obiter dicta* in cases there quoted; and Lord Trayner in *Howe's Trs.*, 5 F. 1099.

[5] *Baillie*, Feb. 23, 1809, F.C., 3 Ross' L.C. 713.

[6] See *Cuming*, 3 Ross' L.C. 712; *Baillie*, *supra*.

[7] See *Campbell*, M. 14,703; *Halley*, 2 D. 623.

[8] *Cowie*, 18 R. 706, rev. 20 R. (H.L.) 81.

[9] See *Duncan*, 10 R. 1042; *Bell's Tr.*, 12 R. 85; *Ramsay*, 15 R. 25; *Douglas' Trs.*, 6 M. 223.

A testator may make a bequest in a testamentary deed to a creditor, and the question may arise whether the testamentary bequest is in satisfaction of the debt, or whether both are exigible. If the debt is a provision to a wife or child constituted, *e.g.*, under a marriage-contract, the bequest is in such a case presumed to be in satisfaction in whole or in part of the provision, according to the maxim, *debitor non presumitur donare*;[1] but this maxim has, it would appear, little application in the case of a bequest to a stranger between whom and the testator the ordinary relationship of debtor and creditor subsists.[2] In a recent case[3] Lord Watson said that the maxim *debitor non presumitur donare* will only prevail in cases where, according to the opinion of the Court on the terms of the documents, the construction of the will favours the substitution of a new and substantially similar provision for the onerous provision which had been previously made in the marriage-contract.[4]

Debitor non presumitur donare.

Bequest to a creditor of testator.

(2) It is very common for a truster to direct part of his estate to be held in liferent for one and in fee for another. If the liferent is not declared alimentary, and the fee has vested, the liferenter and the fiar may call on the trustees to denude themselves of the estate subject to the liferent;[5] but if the liferent is declared *alimentary*, then the trustees must retain the estate, although both liferenter and fiar are anxious that they should denude themselves of it. The Court will not authorise trustees to denude themselves of the fee of an estate burdened with an annuity or a liferent unless the fee is vested indefeasibly.[6]

(2) Direction to hold for one in liferent and another in fee.

(3) Where a truster has directed his trustees to purchase lands with a certain amount of money, and to make them over to a beneficiary in fee-simple, the Court may, in the absence of special circumstances, direct the trustees to pay over the

(3) Effect of direction to buy lands or annuity.

1 See *Kippen*, 18 D. 1137, aff. 3 Macq. 203.

2 See M'Laren, i. 748, on satisfaction of debts by legacies.

3 *Haviland*, 23 R. (H.L.), at p. 9.

4 On satisfaction of marriage-contract provisions by testamentary deed, see also *Keith Johnston's Trs.*, 22 R. 28; *Haviland*, 22 R. 396. aff. 23 R. (H.L.) 6; and see also *Smith's Trs.*, 21 R. 633 (as to satisfaction of legacy by advances).

5 See *Lawson's Trs.*, 17 R. 1167; *Rattray's Trs.*, 1 F. 510.

6 *Muirhead*, 15 R. 254, rev. 17 R. (H.L.) 45.

money directed to be laid out in land, to the beneficiary.[1] Similarly, when trustees are directed to purchase an annuity, not alimentary, the person in whose favour it is provided may call upon the trustees to pay to him the sum which would be necessary to purchase the annuity.[2] Where, however, an annuity is declared to be alimentary, the annuitant cannot call on the trustees to pay over to him the sum necessary to purchase it, nor can the trustees arrange with the annuitant to receive a capital sum in lieu of it.[3]

(4) Fee vested in person *sui juris* cannot be burdened with trust.

Fee may be given subject to power to reduce to liferent.

(4) A truster cannot give a fee to a person who is *sui juris* and burden the fee with trust administration, unless there are trust purposes to be served which cannot be secured without the retention of the estate in trust.[4] But, on the other hand, a fee of an estate may be given subject to a power conferred on trustees of reducing the fee to a liferent in certain events.[5]

(5) Maxim, *Quod fieri debet infectum valet*, in case of direction to convey heritage at a certain time.

(5) A proprietor of heritage may by testamentary trust-disposition direct his trustees to convey his heritage or a part of it at a certain time to a person or series of persons, and the maxim *quod fieri debet infectum valet* has application in the event of his trustees not carrying out his direction.[6]

(6) Effect of declaration that children shall take parent's share.

(6) Where a direction to pay a sum of money or residue to certain beneficiaries and the survivors is subject to an express declaration that in the event of any of them predeceasing leaving issue, such issue shall take their parent's share, such a declaration gives the issue their parent's original share, but no share or part of share which would have accrued to their parent, had he survived the period of vesting,[7] unless there be an express declaration to that effect.[8] A declaration instituting issue to

No application to accrescing share.

[1] *Gordon*, 4 M. 501; *Spens*, 3 R. 50; see also *Sutherland's Trs.*, 8 M. 716.

[2] *Tod*, 9 M. 728; *Kippen*, 10 M. 134; *Dow*, 4 R. 403.

[3] *Smith and Campbell*, 11 M. 639; *Cosens*, 11 M. 761; *White's Trs.*, 4 R. 786.

[4] *Miller's Trs.*, 18 R. 301; *Stewart's Trs.*, 25 R. 302; *Ballantyne's Trs.*, 25 R. 621; and see *Wilkie's Trs.*, 21 R. 199; *Greenlees' Trs.*, 22 R. 136; *Haldane's Trs.*, 23 R. 276; *Graham's Trs.*, 2 F. 232; *Gillies' Trs.*, 3 F. 238; *Yuill's Trs.*, 4 F. 815; *Coats' Trs.*, 5 F. 401; *M'Culloch's Trs.*, 2 F. 749, aff. 6 F. (H.L.) 3.

[5] *Chambers' Trs.*, 5 R. 97, rev. 5 R. (H.L.) 151; and see also *Russell*, 24 R. 666; *Ker's Trs.*, 2 M. 371.

[6] See, *e.g.*, *Love's Trs.*, 7 R. 410.

[7] *Cumming's Trs.*, 20 R. 454; *Henderson*, 17 R. 293; *M'Nish*, 7 R. 96; *Young*, 4 Macq. 337; *Vines*, 22 D. 1436; *Walker*, 21 D. 226; *Thomson*, 12 S. 910, aff. 2 S. & M'L. 305; *Forbes' Executors*, 8 S. 771.

[8] *Laing*, 3 M. 1143; possibly also by clear implication, see Lord Shand in *Henderson*, *supra*; and *Neville*, 23 R. 351.

their parent's share will not entitle the issue of one of a plurality of persons mentioned in the will, but who has predeceased the date of the will, to any share.[1] Where a direction to pay to certain beneficiaries is followed by a clause instituting survivors in the event of any of the beneficiaries predeceasing *without leaving issue*, but nothing is said as to the contingency of a beneficiary predeceasing leaving issue, such issue take their parent's original share, but no share or part of share which would have accrued to their parent, had he survived.[2]

Condition *si institutus sine liberis decesserit.*

(7) Where a testator makes a bequest to beneficiaries related to himself, and does not mention the contingency of their predeceasing leaving or without leaving issue, it is presumed in certain cases that he made the omission through inadvertence, and that, if he had contemplated the existence of such issue, he would have provided for them.[3] Such issue therefore take their parent's share in virtue of the implied condition *si institutus sine liberis decesserit*. This presumption of inadvertence can be overcome by contrary evidence.[4] The beneficiaries must be (*a*) children or more remote descendants of the testator,[5] or (*b*) nephews and nieces of the testator[6] or their descendants,[7] to whom the testator is *in loco parentis*.[8] The bequest must be made on the ground of relationship, and not personal favour to the beneficiary; it does not apply, therefore, to purely personal legacies,[9] nor as a general rule to money legacies.[10] Where the survivance of a particular event is made a condition of participation in a fund, it is said that the *conditio* does not apply.[11] It only applies to original shares, not to accruing shares.[12] The issue of a person who has died before

[1] *Sturrocks*, 6 D. 117; cf. *Low's Trs.*, 19 R. 431; *Morrison's Trs.*, 18 R. 181; and *Rhind's Trs.*, 5 M. 104.

[2] *Douglas*, 6 D. 318; *Clelland*, 1 D. 1031; *Glendinning*, 4 S. 237; *Walker*, Elch. "Implied Will," No. 5.

[3] See Lord Corehouse in *Greig*, 13 S. 607.

[4] *Carter's Trs.*, 19 R. 408; *Douglas' Executors*, 7 M. 504; but see *Forrester's Trs.*, 21 R. 971; *Dixon*, 14 S. 938; *Booths*, 9 S. 406; *Neilson*, 1 S. 458.

[5] See, *e.g.*, *Grant*, 10 R. 92; *Halliday*, 8 M. 112.

[6] See, *e.g.*, *Bogie's Trs.*, 9 R. 453.

[7] See, *e.g.*, *Wallace*, M. App. *voce* "Clause," No. 6.

[8] As to these words see Lords Adam and M'Laren in *Waddell's Trs.*, 24 R. 189; Lord President Inglis in *Bogie's Trs.*, 9 R. 453; and Lord Justice-Clerk Moncreiff in *Blair's Executor*, 3 R. 365.

[9] *M'Alpine*, 10 R. 837; *Brown's Trs.*, 10 R. 441.

[10] See *Allan*, 20 R. 733; *M'Call*, 10 M. 281; *Douglas' Executors*, 7 M. 504.

[11] *Crichton's Tr.*, 18 R. 260; *M'Call*, 10 M. 281; but see *Gauld's Trs.*, 4 R. 691.

[12] *Farquharson*, 2 F. 863; *Bowman*, 2 F. 624; *Aitken's Trs.*, 10 M. 275; *Graham's Tr.*, 6 M. 820; *Thornhill*, 3 D. 394.

the date of a settlement under which he would have benefited cannot take in virtue of the *conditio*.[1] It is doubtful whether it applies to the issue of persons who are only instituted conditionally.[2] It does not apply to the issue of persons receiving merely a liferent;[3] it applies to provisions in marriage-contracts;[4] it is doubtful whether it applies to provisions in *inter vivos* deeds,[5] and it does not apply to provisions in deeds granted by a stranger.[6] Where the bequest is of heritage and the *conditio* applies, the question whether the heir or whole issue of the predeceasing beneficiary succeed, depends on the predilection of the testator as indicated in the deed.[7]

Where bequest bequeathed to several legatees.

(8) Where a legacy is bequeathed to several persons jointly, or jointly and severally, all take equally if they survive the testator; but, in the event of any of them predeceasing the testator, the survivor or survivors take the legacy, unless the language used imports a severance of interest.[8] When the language imports such severance—as, for example, when a legacy is left to A and B equally, or to A and B, share and share alike, or to be divided equally among them, each is entitled to his own share and no more, and there is no room for accretion in the event of the predecease of one or more of the legatees,[9] unless the terms used by the testator show an intention that there should be accretion in favour of survivors.[10] When, however, a legacy is left to a class, the use of words of severance—*e.g.*, among them, share and share alike—does not prevent the right as a whole from vesting in those of the class who survive the period of vesting.[11]

Accretion.

Whether bequest divisible *per capita* or *per stirpes*.

(9) The general rule is, that where a bequest is made to a class—*e.g.*, to the children of A and B—the division is *per capita*,[12]

[1] *Low's Trs.*, 19 R. 431; *Morrison's Trs.*, 18 R. 181; *Rhind's Trs.*, 5 M. 104.

[2] See *Carter's Trs.*, 19 R. 408.

[3] *Hickling's Trs.*, 1 F. (H.L.) 7; *Tulloch*, 1 D. 94.

[4] See, *e.g.*, *Macdonald*, 20 R. (H.L.) 88; *Edwardes*, 18 R. 319, 19 R. (H.L.) 33.

[5] *Crichton's Tr.*, 18 R. 260.

[6] *Marquis*, 23 R. 595.

[7] *Nairn's Trs.*, 5 R. 128; *Earl of Airlie*, 29 S. Jur. 169; *Grant's Trs.*, 24 D. 1211; *Clavering*, 2 S. & M'L. 320 (footnote).

[8] M'Laren, i. 633; and see *Graham's Trs.*, 2 F. 232; and *Anderson's Trs.*, 37 S.L.R. 230.

[9] *Paxton's Trs.*, 13 R. 1191.

[10] *Menzies' Factor*, 1 F. 128; *Muir's Trs.*, 16 R. 954; *Roberts' Trs.*, 5 F. 541; *Bartholomew's Trs.*, 6 F. 322. Cf. *Fergus*, 10 M. 968.

[11] *Douglas*, 2 M. 1008.

[12] *Bogie's Trs.*, 9 R. 453; *Hogg*, 14 R. 887.

unless the testator, by the words he uses in his settlement, taken along with the circumstances and relations in which he stood to the legatees, shows an intention for division *per stirpes*.[1]

Vesting of legacies.

(10) A very large number of questions arises as to whether a legacy has vested or not. A legacy is said to *vest* in a legatee when he is in position to transmit it to his heirs or assignees. Whether vesting takes place at the death of the testator or is postponed to a subsequent date, is a question of intention; but the following are the chief canons of construction which are applied in determining a question of vesting. These canons, however, are liable to be set aside where the intention of the testator, as shown on the face of the deed, appears to be inconsistent with them.[2]

Vesting a question of intention.

Canons of construction.

(a) Where legatee predeceases testator.

(*a*) There can be no vesting in a legatee who predeceases the testator.[3] If a legacy is destined to a person (who predeceases the testator) and his heirs, children, etc., his heirs, children, etc., as the case may be, will take the legacy as conditional institutes.[4]

(b) Clause declaratory of vesting.

(*b*) A testator may insert a clause declaring when legacies shall vest. This clause will fix the period of vesting,[5] unless it is repugnant to the trust purposes as a whole.[6]

(c) Presumption for vesting *a morte testatoris*.

(*c*) There is a presumption in favour of vesting *a morte testatoris* whether the legatees be persons named or a class.[7] Even where the fee of a legacy is burdened with liferents[8] or annuities,[9] it will vest *a morte testatoris* in those called as fiars. If, however, a legacy is burdened with a liferent and the fee is affected with a

Legacy burdened with liferent without or with destination over.

[1] *Laing's Trs.*, 7 R. 244; *Allen*, 13 R. 975; *Cunningham's Trs.*, 18 R. 380; *Low's Trs.*, 19 R. 431; *Inglis*, 19 R. 924.

[2] *E.g.*, *Bowman's Trs.*, 1 F. (H.L.) 69.

[3] *Cooper's Trs.*, 22 D. 380; *Bell*, 7 D. 614; *Graham*, 1807, M. App. "Legacy," No. 3.

[4] *Halliburton*, 11 R. 979; *Cleland*, 18 R. 377; *Brown's Trs.*, 17 R. 1174; *Maxwell*, 3 M. 318; *Haldane's Trs.*, 17 R. 385; *Scott's Executors*, 17 R. 389.

[5] *Mardougall*, 17 R. 761; *Carruthers' Tr.*, 21 R. 492; *Davidson's Tr.*, 9 M. 995; *Brown*, 17 D. 759: *Bowes' Trs.*, 42 S.J. 382; *M'Kay's Trs.*, 5 F. 1086; *M'Laren*, 1907, S.C. 1192; see also *Popham's Trs.*, 10 R. 888; *Jamieson*, 10 M. 755; *M'Elmail*, 16 R. 47; *Hunter's Trs.*, 15 R. 399.

[6] *Croom's Trs.*, 22 D. 45.

[7] *Carleton*, 3 M. 514; aff. 5 M. (H.L.) 151; *Jackson*, 3 R. 627; *Forbes*, 16 S. 374; *Wilkie's Trs.*, 21 R. 199; *Scott's Trs.*, 18 R. 1194.

[8] *Marchbanks*, 14 S. 521; *Cochrane*, 17 D. 103; *Douglas*, 2 M. 1008; *Nimmo*, 2 M. 1144; *Carleton*, 3 M. 514, aff. 5 M. (H.L.) 151; *Jack*, 12 S.L.R. 42; *Jackson*, 3 R. 627; *Ross' Trs.*, 12 R. 378; *Duncan's Trs.*, 9 R. 731; *Popham's Trs.*, 10 R. 888; *Hay's Trs.*, 17 R. 961; *Cunningham*, 17 R. 218; *Scott's Trs.*, 18 R. 1194.

[9] *Pursell*, 15 D. 489, aff. 2 Macq. 273; *Kerr*, 20 D. 562; *Watson*, 18 D. 971; *Jack*, *supra*; *Mellis*, 25 R. 720; see, however, *Sloane*, 3 R. 678.

destination over—that is, is directed to be made over on the expiry of the liferent to A, whom failing, to B,[1] or to A and his heirs[2]—vesting of the fee is postponed until the expiry of the liferent. (*d*) Words of survivorship are referable *in dubio* to the period of distribution, in which case vesting is postponed till that time.[3] (*e*) Where a legacy is payable at a *dies certus*, or even at either a *dies certus* or a *dies incertus*, vesting takes *a morte testatoris*.[4] (*f*) If a testator first gives an unqualified fee to his children, and directs his trustees to *hold* the fee and apply the income *for* their behoof, and thereafter directs payment to be made to each child of his share on the attainment of majority or at some other *dies incertus*, the shares of the children are held to vest *a morte testatoris*;[5] but if the uncertain term of payment is adjected as a condition of the gift itself, as where there is no direct gift to the children, but simply a direction to *pay* to them at a *dies incertus*, vesting is postponed until the term of payment arrives, according to the maxim *dies incertus pro conditione habetur*.[6] (*g*) When nothing is expressed in favour of a beneficiary, except a direction to convey to him on the occurrence of a certain event, and failing him to certain other persons, then survivance of the event is a condition of vesting.[7] (*h*) A fee may vest in a legatee subject to defeasance under the following circumstances:—(1) Where trustees are directed to hold an estate, heritable or moveable, for A in liferent and his issue in fee, whom failing, for an individual or an ascertained class without ulterior destination,[8] the fee will vest in the

(*d*) Import of words of survivorship.

(*e*) Where legacy payable at *dies*, either *certus* or *incertus*.

(*f*) Where date of payment is adjected, or not adjected, as condition of bequest.

(*g*) Where direction to pay on certain event to one who predeceases the event, whom failing, to another.

(*h*) Vesting subject to defeasance.

(1) Where direction to hold for A in liferent and his issue in fee, whom failing, for B (or ascertained class).

[1] *Bell*, 7 D. 614; *Thomson*, 12 S. 910, aff. 2 S. & M'L. 305; *Kinmond's Trs.*, 25 R. 819; *Normand's Trs.*, 2 F. 726.

[2] Lords Watson and Davey in *Bowman's Trs.*, 1 F. (H.L.) 69; *Parlane's Trs.*, 4 F. 805; *Dawson*, 5 F. (H.L.) p. Lord Davey, p. 27; *Forrest's Trs.*, 6 F. 616. But see *Thompson's Trs.*, 2 F. 470; *Matheson's Trs.*, 2 F. 556; *Taylor's Tr.*, 5 F. 1010; *Ogle's Trs.*, 6 F. 359.

[3] *Young*, 22 D. 1527, rev. 4 Macq. 314; *Melrose*, 7 M. 1050; *Muirhead*, 15 R. 254, rev. 17 R. (H.L.) 45; *Neville*, 23 R. 351; *Begg's Trs.*, 1 F. 498; and see for conditional institution, as well as words of survivorship, *Fyfe's Trs.*, 17 R. 450; *Forbes*, 18 R. 230; *Groat*, 21 R. 961; *Bogle's Trs.*, 20 R. 108; *Ross' Trs.*, 21 R. 927; *Neill's Trs.*, 4 F. 636; *Sword's Trs.*, 4 F. 1005; *Steel's Trs.*, 5 F. 239; *Lawrie's Trs.*, 7 F. 910; *Hunt's Trs.*, 8 F. 764; *Macfarlane's Trs.*, 8 F. 787; *Banks' Trs.*, 1907, S.C. 125.

[4] *Home*, Hume, 530; *Mackintosh*, 10 M. 933.

[5] *Jackson*, 3 R. 627; *Alves' Trs.*, 1 R. 969; *Wilson's Trs.*, 5 R. 697; *Byars' Trs.*, 14 R. 1034; *Hunter's Trs.*, 15 R. 399; *Mackinnon's Trs.*, 24 R. 981; *Normand's Trs.*, 37 S.L.R. 517; *White*, 2 F. 1170; *Taylor's Trs.*, 5 F. 1010. Cf. *Normand's Trs.*, 2 F. 726.

[6] *Omey*, M. 6340; *Fyfe's Trs.*, 17 R. 450; *Muir's Trs.*, 16 R. 954; *Brodie*, 20 R. 795; *Forbes*, 18 R. 230; *Groat*, 21 R. 961; *Adams' Trs.*, 23 R. 828; *Graham's Trs.*, 2 F. 232; *Purves' Exr.*, 25 R. 1084; *Wilson's Trs.*, 3 F. 967; *Ross' Trs.*, 4 F. 840.

[7] *Bryson's Trs.*, 8 R. 142; *Graham's Trs.*, 2 F. 232; *Sword's Trs.*, 4 F. 1005.

[8] *Corbett's Trs.*, 3 F. 963.

individual or the ascertained class *a morte testatoris*, subject to divestiture in the event of the liferenter leaving issue;[1] and where trustees are directed to hold such estate for A in liferent and B and his *issue* (not heirs) in fee, without ulterior destination, the fee vests in B *a morte*, subject to defeasance in the event of his predeceasing A and of his leaving issue.[2] (2) Where a testator first gives an *absolute*[3] gift to a child, and then later directs it to be held for the child in liferent or liferent allenarly and his issue in fee, the fee vests *a morte testatoris* in the child, subject to defeasance in the event of his leaving issue.[4] (*i*) If a person is entitled to the liferent of a fund which is directed, in the event of the liferenter's leaving issue, to be paid to them, and some of the issue survive the testator but predecease the liferenter, and some of them survive both the testator and the liferenter, the representatives of the issue who predeceased the liferenter are entitled to share in the fund.[5] (*j*) There is no presumption for a uniform period of vesting for different bequests under the same settlement other than the presumption for vesting *a morte testatoris*;[6] but when trustees are directed to hold a fund for behoof of children, and to make payment to them when that can conveniently be done, and there is a declaration that, if a child shall die without receiving payment of his share, his share shall accresce to the survivors, the rule is that payment to one beneficiary fixes the period of vesting for all the children.[7] (*k*) A fee may vest in a person subject to the exercise of a power of appointment given, for example, to trustees to restrict it to a liferent;[8] and a right of fee may vest in one or more of a class

(2) Protected succession.

(*i*) Effect of destination of fee, burdened with liferent, to liferenter's issue, in the event of his leaving issue, where some of issue predecease, some survive liferenter.

(*j*) No uniform period for vesting.

(*k*) Vesting subject to power of appointment, or diminution by birth of other legatees.

[1] *Steel's Trs.*, 16 R. 204. See in addition to *Steel's Trs. Snell's Trs.*, 4 R. 709; *Taylor*, 5 R. 49, rev. 5 R. (H.L.) 217; *Gregory's Trs.*, 14 R. 368, rev. 16 R. (H.L.) 10; questioning *Haldane's Trs.*, 9 R. 269; *Cumming's Trs.* 23 R. 94; *Searcy's Trs.*, 1907, S.C. 823; and comp. *White's Trs.*, 20 R. 460; *Cumming's Trs.*, 20 R. 454; *Thompson's Trs.*, 2 F. 470; *Gardner*, 2 F. 679; *M'Donald's Trs.*, 14 S.L.T. 407.

[2] *Cairns' Trs.*, 1906, S.C. 117.

[3] *Muir's Trs.*, 22 R. 553; and see *Reeve's Executor*, 19 R. 1013; *Wright's Trs.*, 21 R. 568.

[4] *Dalglish's Trs.*, 16 R. 559; *Lindsay's Trs.*, 8 R. 281; *Logan's Trs.*, 17 R. 425; *Downie's Trs.*, 9 R. 749; *Stewart's Trs.*, 23 R. 416; *Mackay's Trs.*, 24 R. 904; *Laing's Trs.*, 36 S.L.R. 701; *Dunlop's Trs.*, 1 F. 722; and see also *Greenlees' Trs.*, 22 R. 136; *Gillies' Trs.*, 3 F. 238. Cf. *Newall's Trs.*, 25 R. 1176; *Tweeddale's Trs.*, 8 F. 264.

[5] *Hickling's Trs.*, 1 F. (H.L.) 7; *Scott's Trs.*, 2 F. 516; for limitation of rule see *Wilson's Trs.*, 3 F. 967.

[6] See *Neill's Trs.*, 4 F. 636.

[7] *Sutherland's Trs.*, 2 R. 46.

[8] *Chambers' Trs.*, 5 R. 97, rev. 5 R. (H.L.) 151; and see *White's Trs.*, 23 R. 836; *Russell*, 24 R. 666; *M'Nicol's Executors*, 20 R. 386.

to whom a legacy is bequeathed, subject to the right so vested being diminished by the birth of other members[1] of the class, or partially or wholly defeated by the exercise of a power of appointment conferred by the testator.[2] (*l*) Where a bequest is given by direct disposition without an intervening trust, the foregoing canons are affected by the rule that a fee cannot be *in pendente*.[3] (*m*) A condition attached to a bequest to an institute does not affect a conditional institute (*e.g.*, where a legacy is given to A on his attaining the age of thirty, whom failing, to his issue, the legacy will, if A dies before that age, vest in his issue on his death immediately whatever their age may be).[4] (*n*) Where a bequest is made, on the expiry of a liferent, to a class and the survivor or survivors in fee, then, on the class being reduced to one survivor, the bequest will vest in him whether he survive the liferenter or not.[5]

(*l*) Where bequest given without intervening trust, fee cannot be *in pendente*.

(*m*) Condition affecting institute does not affect conditional institute.

(*n*) Bequest to a class and the survivor when one survivor left.

Deeds struck at by Thellusson Act, as amended by Rutherfurd Act and Accumulations Act.

(11) Sometimes a truster's directions come into collision with what may be called the law against accumulations as regulated by the Act 39 & 40 George III., c. 98, known as the Thellusson Act, by section 41 of the Rutherfurd Act, 1848, and by the Accumulations Act, 1892.[6]

Restriction on power to create successive liferents by Rutherfurd Act, 1848, and Entail Amendment Act, 1868.

(12) The Rutherfurd Act, 1848,[7] declared that for the future it should be competent to grant an estate in Scotland limited to a liferent interest in favour only of a party in life at the date of such grant; and that where any land should, under any deed dated after the passing of the Act, be held in liferent by a party of full age, born after the date of the deed, such party should not be affected by any restrictions or limitations contained in the deed, but should be deemed to be the fee-simple proprietor of such estate. By section 17 of the Entail Amendment Act, 1868, these provisions were extended to moveables.[8]

[1] *Miller*, 2 R. (H.L.) 1; *Buchanan's Trs.*, 4 R. 754; *Ross*, 5 R. 833; *Hayward's Executors*, 22 R. 757; and see *Carleton*, 3 M. 514, aff. 5 M. (H.L.) 151; *Cunningham*, 17 R. 218; *Steel's Trs.*, 5 F. 239.

[2] *Gillies' Trs.*, 3 F. 238; *Walker*, 8 F. 201.

[3] See *Turner*, 21 R. 563.

[4] *Cattanach's Trs.*, 4 F. 205; see *Banks' Trs.*, 1907, S.C. 125.

[5] *Gardner*, 2 F. 679.

[6] 55 & 56 Vict., c. 58; for the provisions of these Acts see H.R. 659.

[7] S. 48.

[8] See H.R. 663.

(13) If a truster simply directs his trustees to dispose of his estate, or part of it, in such way as they think proper, such a direction is held void from uncertainty.[1] A truster's direction, however, to his trustees to apply his estate or part of it for behoof of such *charitable* purposes as his trustees may think proper is not void,[2] for charitable purposes are in a favoured position. A direction, "to such *public* purposes as my trustees may select," is void.[3] Directions to apply to "such charitable *or* public purposes"[4] or to "such charitable *or* religious institutions as my trustees may select"[5] are void, because the disjunctive "or" renders the bequest too wide. If the direction is to apply to "such charitable *and* public purposes," the direction is probably good, as the word "public" is qualified and restricted by the word "charitable."[6] It is at present undecided whether religious bequests or public bequests of this nature to be made within a local area, thus restricting the trustees' choice, are valid.[7]

(13) When truster's directions void from uncertainty.

IV. Powers of Trustees.—If the maker of a trust-deed intends that the powers of his trustees shall be greater than those conferred on them by statute or common law, he must specify additional powers in the trust-disposition and settlement.

IV. Powers of trustees.

The Trusts Acts, 1861 to 1898, confer various powers on trustees, which require notice.

Trusts Acts, 1861 to 1898.

Trustees under the Trusts Acts have power to do the following acts, unless they are at variance with the terms or purposes of the trust, and the acts when done are as effectual as if they had been authorised by the trust-deed,[8] viz.:—(1) *To appoint factors and law agents, and to pay them a suitable remuneration.*[8] (2) *To discharge trustees who have resigned, and the representatives of trustees who have died.*[8] (3) *To grant leases of the heritable estate of a duration not exceeding twenty-one years for agricultural lands, and thirty-one years for minerals, and to*

Trustees have power to—

(1) Appoint factors and law agents.

(2) Discharge trustees.

(3) Grant leases.

1 *Sutherland's Trs.*, 20 R. 925; *Anderson*, 25 R. 493. Cf. *Playfair's Trs.*, 2 F. 686.

2 *Cobb*, 21 R. 638; *Crighton*, 3 W. & S. 329; *Miller*, 14 S. 555, aff. 2 S. & M'L. 866; *Hill*, 2 W. & S. 80.

3 Lord Robertson in *Blair*, 4 F. (H.L.) 1.

4 *Blair*, 3 F. 274, aff. 4 F. (H.L.) 1.

5 *Grimond*, 6 F. 285, rev. 7 F. (H.L.) 90.

6 Cf. *Cobb*, 21 R. 638.

7 See *Brown's Trs.*, 13 S.L.T. 72; *Shaw's Trs.*, 8 F. 52; *Smellie's Trs.*, 13 S.L.T. 450.

8 30 & 31 Vict., c. 97, s. 2.

remove tenants,[1] *and to make abatement or reduction, either temporary or permanent, of the rent, lordship, royalty, or other consideration stipulated in any lease of lands, houses, tenements, minerals, metals, or other subjects, and to accept renunciations of leases of any such subjects.*[2] (4) *To uplift, discharge, or assign debts due to the trust-estate.*[3] (5) *To compromise or to submit and refer all claims connected with the trust-estate.*[4] (6) *To grant all deeds necessary for carrying into effect the powers vested in the trustees.*[4] (7) *To pay debts due by the truster or by the trust-estate without requiring the creditors to constitute such debts where the trustees are satisfied that the debts are proper debts of the trust.*[4]

(4) Uplift debts.
(5) Compromise and refer claims.
(6) Grant necessary deeds.
(7) Pay debts.

Powers of investment by trustees.

Trustees under any trust, unless specially prohibited by the constitution or terms of the trust, may invest the trust funds[5]—

(*a*) In the purchase of—(1) any of the government stocks, public funds, or securities of the United Kingdom; (2) stock of the Bank of England; (3) any securities, the interest of which is or shall be guaranteed by Parliament; (4) debenture stock of railway companies in Great Britain incorporated by Act of Parliament; (5) preference, guaranteed, lien, annuity, or rent-charge stock, the dividend on which is not contingent on the profits of the year, of such railway companies in Great Britain as have paid a dividend on their ordinary stock for ten years immediately preceding the date of investment; (6) stock or annuities issued by any municipal corporation in Great Britain, which annuities, or the interest or dividend upon which stock, are secured upon rates or taxes levied by such municipal corporation under the authority of any Act of Parliament; (7) East India stock,[6] stocks or other public funds of the government of any colony of the United Kingdom, approved

[1] 30 & 31 Vict., c. 97, s. 2.

[2] 60 Vict., c. 106, s. 2. This section is substituted for section 2 of the Trusts Act, 1887. The Trusts Act, 1887, s. 3, also contains this provision—that "no abatement or reduction of rent or acceptance of renunciation of any such lease heretofore made by trustees shall be liable to be challenged which would have been lawful if made after the passing hereof."

[3] See *Donald*, 21 R. 246; *Carruthers*, 17 R. 769 (cases of neglect to recover debts due to trust).

[4] 30 & 31 Vict., c. 97, s. 2; *Hadden*, 1 F. 710.

[5] By 47 & 48 Vict., c. 63, s. 3, repealing s. 5 of 30 & 31 Vict., c. 97, and amended by 61 & 62 Vict., c. 42.

[6] See 47 & 48 Vict., c. 63, s. 2, as to meaning of the expression.

by the Court of Session, and also bonds or documents of debt of any such government, approved as aforesaid, provided such stocks, bonds, or others are not payable to the bearer, and such "colonial stocks" as are registered in the United Kingdom in accordance with the provisions of the Colonial Stock Acts, 1877 and 1892, as amended by the Colonial Stock Act, 1900, and fulfil the conditions prescribed by the Treasury in terms of the Act of 1900;[1] (8) feu-duties or ground-annuals; (9) redeemable stock issued under the Local Authorities Loans (Scotland) Acts, by any local authority in Scotland.[2]

(*b*) In loans—(1) on the security of any of the stocks, funds, or other property aforesaid; (2) on real or heritable security in Great Britain; (3) on debentures or mortgages of railway companies in Great Britain incorporated by Act of Parliament; (4) on bonds, debentures, or mortgages secured on rates or taxes levied under the authority of any Act of Parliament by municipal corporations in Great Britain authorised to borrow money on such security; (5) on Indian railway stock, debentures, bonds, or mortgages on which the interest is permanently guaranteed by the Indian Government, and payable in sterling money in Great Britain;[3] (6) on bonds, debentures, or mortgages secured on any rate or tax levied under the authority of any Act of Parliament by any local authority in Scotland authorised to borrow money on such security.[2]

Trusts Acts do not control powers given to trustees by trust-deed.

The powers of investment conferred by the Trusts Acts are not held or construed as restricting or controlling any powers of investment of trust funds expressly contained in any trust-deed.[4]

Power to invest in debenture stock implied in power to invest in bonds and mortgages of company.

Where a power is given to trustees to invest trust funds in the mortgages or bonds of a railway company, or of any other description of company, such power is, unless the contrary is expressed in the trust-deed, deemed to include a power to invest such funds in the debenture stock of a railway company or such other company.[5]

[1] 63 & 64 Vict., c. 62.

[2] 61 & 62 Vict., c. 42, s. 3. Section 4 provides that the Act shall not be construed to authorise a local authority to invest in any securities of such local authority any money required by the Local Authorities Loan (Scotland) Acts, or by statutory sinking fund regulations in force for the time being, to be invested.

[3] 47 & 48 Vict., c. 63, s. 3.

[4] 30 & 31 Vict., c. 97, s. 6.

[5] 34 & 35 Vict., c. 27, "The Debenture Stock Act, 1871."

Further powers and immunities under trust-deeds.

All trust-deeds, in the sense of the Trusts Acts, under which gratuitous[1] trustees are nominated, are held to include the following provisions, unless the contrary is expressed:—(1) *A power to any trustee to resign the office of a trustee unless any legacy, or bequest, or annuity is expressly given on condition of his accepting the office of trustee.*[2] (2) *Power to a sole trustee or to trustees, or a quorum of them, to assume new trustees.*[3] (3) *A provision that the majority of the trustees accepting and surviving shall be a quorum.*[4] (4) *A provision that each trustee shall only be liable for his own acts and intromissions, and shall not be liable for omissions, or for the acts and intromissions of co-trustees.*[5]

(1) Power to resign office.

(2) Power to assume new trustees.

(3) Power to act by majority.

(4) Liability for own acts only, not those of other trustees.

Powers which can be exercised with consent of Court or of beneficiaries.

The powers which have been referred to are those which as a rule can be exercised without either the authority of the Court or consent of the beneficiaries under the trust. There are other powers which trustees may exercise either with the authority of the Court or with the consent of all the beneficiaries under the trust in existence when they are of full age and capable of acting. Thus, under the Trusts Act, 1867, it is competent to the Court of Session on the petition of the trustees to grant authority to them to do any of the following acts *on being satisfied* that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof:[6]—(1) *To sell the trust estate, or any part of it*; (2) *to grant feus or long leases of the heritable estate, or any part of it*; (3) *to borrow money on the security of the trust estate, or any part of it*; (4) *to excamb any part of the trust estate which is heritable.* To the exercise of these acts the authority of the Court is not essential in all cases, for the Act provides that when all the beneficiaries under the trust in existence at the date of presenting such petition are of full age, and capable of acting, it shall be in their power, by deed of consent, to grant authority to the trustees to do any of the four acts above specified, the same not being inconsistent with the intention of the trust.[7] All powers of sale conferred on trustees by the trust-deed or by virtue of

(1) Selling.
(2) Feuing.
(3) Borrowing.
(4) Excambion.

Sale by public roup or private bargain.

[1] See 30 & 31 Vict., c. 97, s. 1.
[2] 24 & 25 Vict., c. 84; and 30 & 31 Vict., c. 97, s. 1.
[3] 24 & 25 Vict., c. 84, s. 1; and see p. 242, *infra*; *Munro's Trs.*, 14 R. 574.
[4] 24 & 25 Vict., c. 84, s. 1.
[5] *Ibid.* On this provision see M'Laren, ii. 1216 *et seq.*
[6] 30 & 31 Vict., c. 97, s. 3.
[7] *Ibid.*

the Trusts Act, 1867, may be exercised either by public roup or private bargain, unless otherwise directed in the trust-deed, or in the authority given by the Court, or in the deed of consent granted by the beneficiaries. When the estate is heritable it is lawful in such sales to sell, subject to or under reservation of a feu-duty or ground-annual, at such rate and on such conditions as may be agreed upon, and in all sales and feus it is lawful to reserve the mines and minerals if so wished.[1]

Selling under feu-duty or ground-annual.

A trust-deed often authorises trustees to make advances to children out of their presumptive shares before the period of vesting,[2] and the Trusts Act, 1867, provides that the Court may from time to time, under such conditions as they see fit, authorise trustees to advance any part of the capital of a fund destined either absolutely or contingently *to minor descendants of the truster, being beneficiaries having a vested interest in such fund*, if it shall appear that the income of the fund is insufficient or not applicable to, and that such advance is necessary for, the maintenance or education of such beneficiaries, or any of them, and that it is not expressly prohibited by the trust-deed, and that the rights of parties other than the heirs or representatives of such minor beneficiaries shall not be thereby prejudiced.[3] It has been held that the words "vested interest" in section 7 of the Act of 1867 mean "primary interest," although the fund may not actually have vested.[4]

Advances to beneficiaries under trust-deed; or under statute.

The Court may also authorise trustees to apply the whole or any part of the trust-funds which they are empowered or directed by the trust-deed to invest in the purchase of heritable property to the payment or redemption of any debt or burden affecting heritable property which may be destined to the same series of heirs, and subject to the same conditions as are by the trust-deed made applicable to the heritable property directed to be purchased, provided always that such application is not inconsistent with the other provisions of the trust-deed.[5]

Application of trust-funds for redemption of debt.

1 S. 4.

2 See, *e.g.*, *Baird's Trs.*, 19 R. 1045.

3 S. 7.

4 *Pattison and Others*, 8 M. 575; see also *Ross' Trs.*, 21 R. 995 (where accumulated income treated as part of capital); *Clark's Trs.*, 22 R. 706; and see *Websters*, 14 R. 501 (advance to children out of income directed to be accumulated); *Colquhoun*, 21 R. 671; *Muir*, 15 R. 170; *Seddon*, 20 R. 675; *Latta* 7 R. 881; *Thomson*, 11 R. 401; *Martin*, 6 F. 592.

5 30 & 31 Vict., c. 97, s. 8.

Discharge of trustee resigning office.

When a trustee who resigns, or the representatives of a trustee who has died or resigned, cannot obtain a discharge of his acts and intromissions from the remaining trustees, and when the beneficiaries of the trust refuse, or are unable, from absence, incapacity, or otherwise, to grant a discharge, the Court may, on petition at the instance of such trustee or representative, grant a discharge to him.[1]

How trustee resigns office.

Any trustee entitled to resign his office may do so by minute of the trust entered in the sederunt book of the trust, and signed in the sederunt book by such trustee and by the other trustee or trustees acting at the time, or he may do so by signing a minute of resignation in the form of schedule (A) annexed to the Trusts Act, 1867, or to the like effect, and may register the same in the books of Council and Session. In the latter case he is bound to intimate the same to his co-trustee or trustees, and the resignation is held to take effect from and after the expiry of one calendar month after the date of such intimation, or the last date thereof if more than one, if the trustee or trustees to whom such intimation was given are within Scotland, or otherwise within three calendar months from and after that date. If after inquiry the residence of any trustee to whom intimation should be given cannot be found, such intimation requires to be given edictally in usual form, and the resignation in that case is held to take effect from and after the expiry of six months.[2] It has been held that a minute of resignation by a trustee in the form of schedule (A) of the Act of 1867 could not be revoked after intimation to the co-trustees, although it did not come into operation till a subsequent date.[3]

Minute of resignation cannot be revoked.

Procedure when sole trustee desires to resign.

If any trustee entitled to resign office is at the time sole trustee, he is not entitled to resign until, with the consent of the beneficiaries under the trust of full age and capable of acting at the time, he has assumed new trustees, who have declared their acceptance of office. He may, however, apply to the Court, stating his wish to resign, and praying for the appointment of new trustees or of a judicial factor to

[1] 31 & 32 Vict., c. 97, s. 9.
[2] S. 10.
[3] *Fullarton's Trs.*, 23 R. 105.

administer the estate. After intimation to the beneficiaries under the trust, or such of them as the Court may direct, the Court can thereafter either appoint a judicial factor, or, on the application of the beneficiaries, or any of them, may appoint trustees in the same manner as is provided under the 12th section of the Act of 1867. After such appointment either of judicial factor or of trustees, the petitioning trustee is entitled to resign; and any retiring trustee or trustees who have already retired are bound when required, and at the expense of the trust, to execute all deeds necessary for divesting them of trust property, and conveying the same to the trustees or trustee, or judicial factor acting in execution of the trust.[1]

V. Nomination of trustees to be executors.

V. NOMINATION OF TRUSTEES TO BE EXECUTORS.—The proper course is to appoint those named as trustees to be also executors; but in practice, where the heritable and moveable estate is conveyed to testamentary trustees, and they are directed expressly or by implication to administer the moveable estate, they are held to be *ipso facto* executors-nominate, and are confirmed as such.[2]

VI. Appointment of trustees as tutors and curators to minor beneficiaries.

VI. APPOINTMENT OF TRUSTEES TO BE TUTORS AND CURATORS TO MINOR CHILDREN.—The trustees are often appointed tutors and curators to such of the truster's children as shall be under age at the time of his death.[3]

VII. Clause revoking prior settlements.

VII. CLAUSE REVOKING PRIOR SETTLEMENTS.—In formal testamentary deeds there is very often inserted a clause revoking all prior settlements of a testamentary nature. A declaration in a testamentary deed that is irrevocable will not bar revocation,[4] and the mere delivery of a testamentary deed does not render it irrevocable.[5] Where, however, a testamentary writing embodies a contract it is irrevocable,[6] and if a delivered testamentary deed confers an indefeasible right on a person in existence, it will be irrevocable.[7] The revocation of a testamentary writing is effectual if the revoca-

[1] S. 10; and see Trusts (Scotland) Amendment Act, 1891, 54 & 55 Vict., c. 44, S. 7.

[2] See Currie on Confirmation of Executors, p. 52.

[3] *Johnston*, 20 R. 46.

[4] *Dougall's Trs.*, M. 15,949.

[5] *Somerville*, May 18, 1819, F.C.; *Miller*, 4 S. 822.

[6] *Paterson*, 20 R. 484; *Robertson's Trs.*, 2 F. 1097; *Corrance's Trs.*, 5 F. 777; Moveable Rights, p. 540.

[7] M'Laren, i. 415 *et seq.*

tion is contained in a tested or holograph writing of the testator; but if the revoking deed is improbative, and therefore invalid, the testamentary deed will receive effect.[1] Revocation may also be accomplished by destroying or cancelling a testamentary deed *animo revocandi*; and when a testament which at one time existed is not forthcoming at the testator's death, the presumption, in the absence of evidence to the contrary, is that he destroyed it *animo revocandi*.[2] The testator may give instructions to another to destroy a testamentary deed; and when it is proved that a testator handed the deed to another to destroy it, the deed will be held to have been destroyed, although the instructions have not been carried into effect.[3]

Revocation by destruction.

Implied revocation.

Revocation may not only be express, as by deed or clause of revocation, or by destruction or cancellation, but it may also be implied by a subsequent inconsistent testamentary writing,[4] and where a testamentary writing is a universal settlement of the testator's estate, it revokes by implication all prior settlements.[5] Further, a testament may be impliedly revoked in respect of the operation of the condition *si testator sine liberis decesserit*.[6]

VIII. Reservation of liferent, etc.

VIII. Reservation of Liferent and Power to Revoke and Alter.—This clause is usually inserted, but, apart from it, the rule is, that under a testamentary deed no person takes an indefeasible right prior to the death of the testator, and if the deed is undelivered, as it usually is, the maker of it can add to or take from it as he chooses.[7]

IX. Clause dispensing with delivery.

IX. Clause Dispensing with Delivery.

X. Consent to registration.

X. Consent to Registration.

XI. Testing clause.

XI. Testing Clause.

Completion of Title.

(1) Testator infeft, and particular description of lands in testamentary writing.

I. How Disponees (Trustees or others) under a Trust-Deed Complete a Title.

(1) If a testator dies with a *feudalised* title to land, and his testamentary deed contains a description which is a warrant for

[1] *Stirling Stuart*, 12 R. 610.
[2] See *Bonthrone*, 10 R. 779.
[3] *Chisholm*, M. 12,320.
[4] *Jamieson's Trs.*, 2 F. 258.
[5] *Grant*, 11 D. 860, rev. 1 Macq. 163; *Brander's Trs.*, 10 R. 1258; *Dick's Trs.*, 1907, S.C. 953.
[6] See Moveable Rights, p. 538.
[7] But where it embodies a contract, etc., see p. 237, *supra*.

de plano infeftment, the disponees can make up a title as under an ordinary disposition—

(*a*) By recording the deed with a warrant of registration ; or

(*b*) By expeding and recording, with a warrant of registration, a notarial instrument in the form of schedule (J) of the Titles to Land Consolidation Act, 1868.[1]

Codicils, deeds of nomination, and other writings annexed to or endorsed on deeds or conveyances, or bearing reference to deeds or conveyances separately granted, and decrees of declarator naming or appointing persons to exercise or enjoy the rights or powers conferred by deeds or conveyances, are deemed and taken, for the purposes of the Titles to Land Consolidation Act, 1868, to be parts of the deeds or conveyances to which they severally relate, and they have the same effect in all respects as to the persons so named and appointed as if they had been appointed in the deeds or conveyances themselves.[2] Codicils, etc.

(2) If a testator infeft in lands grants a general disposition, the disponee can complete his title, either (2) Testator infeft, but lands not particularly described.

(*a*) By expeding and recording with a warrant of registration a notarial instrument in the form of schedule (L) of the Titles to Land Consolidation Act, 1868 ;[3] or

(*b*) By getting the heir of the testator to make up a title by service or other competent method and conveying the lands to him ; or

(*c*) By raising an action of constitution and adjudication against the heir of the maker of the general disposition, and (1) recording, with a warrant of registration, the extract decree obtained by him in the action, or (2) expeding thereon and recording a notarial instrument with a warrant of registration.[4]

Prior to the passing of the Titles Acts of 1858 and 1860, the disponee under a general disposition which did not contain the executive or feudal clauses made up a title to the lands in which his author died infeft, either (*a*) by getting the heir of the last investiture to make up a title to the lands, and there-

[1] Ss. 15, 17 ; and see p. 68, *supra*.
[2] S. 3.
[3] S. 19
[4] Bell's Lect. ii. 938 ; 31 & 32 Vict., c. 101, s. 60.

after obtaining from the heir a conveyance in virtue of which the disponee could either take infeftment and get a charter of confirmation from the superior, or get a charter of resignation from the superior and take infeftment thereunder; or (*b*) by obtaining a decree of constitution and adjudication against such heir. This decree was, in case of feudal subjects, followed by a charter of adjudication from the superior and infeftment thereon, and was, in the case of burgage subjects, followed by recording an instrument of resignation and sasine.[1]

(3) Where testator has an unfeudalised title.

(3) Where a testator dies with an unfeudalised title to land, and grants a trust-disposition or other testamentary deed containing a special or general conveyance of his subjects, the disponee under it cannot make up a title *de plano*, and he may do so either by

(*a*) Expeding and recording with a warrant of registration a notarial instrument in the form of schedule (J) of the Titles to Land Consolidation Act, 1868; or

(*b*) By recording the conveyance by the person last infeft, with a warrant of registration in his own favour, along with a notarial instrument in the form of schedule (N) of the Titles to Land Consolidation Act, 1868, docqueted with reference to the warrant of registration.[2]

(4) Where testator has only a personal right in the sense of Conveyancing Act, 1874, s. 9.

(4) A testator may have only a *personal* right to land in the sense of section 9 of the Conveyancing Act, 1874, in which case his testamentary disponee cannot make up a title without judicial procedure, as will be shown fully in a subsequent chapter.[3] A disponee of such right requires to present a petition under section 10 of the Conveyancing Act of 1874, and to take infeftment in virtue of the decree.

Two or more general dispositions as links in the completion of title.

Section 19 of the Act of 1868 provided that a grantee under a general disposition should be entitled to expede and record a notarial instrument in the form of schedule (L) of the Act, but in the case of *Smith* v. *Wallace*[4] it was held that to enable a person, other than the original grantee, to complete a title

[1] Bell's Lect. ii. 938.
[2] S. 23.
[3] See Chapter V.
[4] *Smith*, 8 M. 204.

in this way, he must have an assignation, general or special, of the general disposition. In practice, a general disposition does not usually contain a clause of assignation of writs, and the effect of this decision was to make it incompetent to use two or more general dispositions as connecting links in the series of writs on which a title was to be made up. Section 29 of the Conveyancing Act, 1874, however, provides that no decree, instrument, or conveyance under the Act of 1874, and no other decree, instrument, or conveyance, whether dated before or after the commencement of the Act, shall be deemed to be invalid, *either* because the series of titles connecting the person obtaining such decree, or expeding such instrument, or holding such conveyance, with the person last infeft, shall contain, as links of the series, two or more general dispositions, *or* because any general disposition, forming a part of the series, does not contain a clause of assignation of writs. By section 31 of the Act of 1874 an extract decree of general service was made equivalent to a general disposition.[1]

Trustees may complete title where no direct conveyance to them.

Before 1874, if trustees were appointed to administer the testator's estate, but there were no words of conveyance in their favour, then, in order to complete a title, they required to get the testator's heir to make up a title to the testator's heritage, and thereafter to convey the heritage to them, and if he refused to do so, they could make up a title by means of an action of constitution and adjudication.[2] Section 46 of the Act of 1874, however, provides that where in any testamentary writing, purporting to convey lands, and appointing trustees or executors, the words of conveyance are not expressed to be in favour of such trustees or executors, it shall nevertheless be lawful for such trustees or executors to complete a title as if the conveyance were in favour of them as such trustees or executors, and that in any manner competent to a general disponee.

Probate equivalent to will or extract for completing title.

Section 20 of the Titles to Land Consolidation Act, 1868, rendered it competent to bequeath heritable estate in Scotland

[1] See Chapter V., *infra*.

[2] *Robb's Trs.*, 10 M. 692; *M'Leod's Trs.*, 2 R. 481.

by will executed in England or any foreign country in accordance with the formalities required by the place of execution;[1] but a difficulty arose in making up a title as to whether a notarial instrument could be competently expede on the probate—that is, an official extract of the will. This doubt was removed by section 51 of the Conveyancing Act, 1874, which makes the probate or an exemplification of it (*i.e.*, a copy under the seal of the Court where the testamentary deed has been recorded) equivalent, for the purpose of expeding a notarial instrument, to the testamentary deed itself or an extract thereof; and the Conveyancing Act (1874) Amendment Act, 1887,[2] places letters of administration of a testamentary deed, issued by any Court of Probate in England, or in Ireland, or in any British colony or dependency, or an exemplification of such letters of administration, in the same position.

Letters of administration of will, etc., equivalent to will for authorising notary to expede instrument.

II. Assumption of Trustees.—When trustees have the power of assuming new trustees, whether by the Trusts Acts or by the terms of the deed under which they act, such new trustees may be assumed by deed of assumption executed by the acting trustee or trustees, or by a quorum of them, in the form of Schedule (B) of the Trusts Act, 1867.[3]

Assumption of trustees.

In this form the assuming trustee or trustees convey the trust-estate not only to the trustees who are assumed, but also to himself or themselves.

III. How Beneficiaries under a Lapsed Trust can make up a Title to the Trust-Estate.—When all the trust purposes have been implemented, other than the conveyance of estate, heritable or moveable, to beneficiaries, and there is no trustee surviving and capable of acting, the beneficiaries have various ways in which they can reduce the trust-estate into their possession. (*a*) They may do so under the powers of section 14 of the Trusts Act, 1867, which provides that when any person shall be entitled *to the possession for his own absolute use of any property*, the title to which has been taken in the name of any trustee, or *curator bonis*, or factor *loco absentis*, or factor *loco*

Completion of beneficiaries' title under a lapsed trust.

(*a*) By petition and infeftment on warrant by Court.

[1] *Connel's Trs.*, 10 M. 627.
[2] S. 5.
[3] S. 11; see *Wyse*, 8 R. 983; *Reid*, 14 D. 449.

tutoris, or judicial factor, or other person who has died or has become incapable of acting without having executed a conveyance of such property, he may apply by petition to the Court for authority to complete a title to such property in his own name. The petition must specify and describe the heritable property, and refer to an inventory in which the moveable or personal property to which such title is to be completed is specified. The Court can grant a warrant for completing such title, specifying and describing the heritable property, and also specifying the moveable or personal property or bearing reference to the inventory; and to heritable property, the beneficiaries complete their title by recording the extract warrant of the Court, with a warrant of registration, in the appropriate Register of Sasines.[1] The assignee of a beneficiary cannot use a petition under section 14 of the Act of 1867 for the completion of his title.[2] (*b*) At common law a beneficiary under a lapsed trust may also complete a title by raising against the heir of the last surviving trustee an action of declaratory adjudication.[3] The beneficiary, on obtaining his decree, records an extract thereof in the Register of Sasines if the last trustee died infeft in the lands; but if the last trustee was not infeft, he requires to use the extract decree as an assignation, and to complete a title by expeding and recording a notarial instrument.[4] (*c*) If there is a destination in the trust-deed to the heir of the last survivor of the trustees, such heir can make up titles and convey to the beneficiaries; and since the commencement of the Conveyancing Act, 1874, even where there is no such destination, the heir of the last trustee, being of full age and not subject to any legal incapacity, can, in the absence of any contrary provision in the deed of trust or contrary order made by the Court of Session, make up a title in the same manner as any other heir, and convey to the beneficiaries, if the whole trust purposes, except the conveyance of the lands in terms of the trust, have been executed. Such heir cannot, unless under the orders of the Court, or with the consent and approval of the beneficiaries

(*b*) By raising action of declaratory adjudication.

(*c*) By getting heir of last trustee to make up title, and to convey.

[1] 30 & 31 Vict., c. 97, s. 14; 31 & 32 Vict., c. 101, s. 24; and see *Cowper and Others* (O.H.), 5 S.L.T. 85.

[2] *Macknight*, 2 R. 667.

[3] Bell's Lect. ii. 1010.

[4] 37 & 38 Vict., c. 94, s. 62.

(being all above age and not subject to any legal incapacity), administer the trust.[1]

Completion of title of new trustees, etc., appointed by Court.

IV. Appointment of New Trustees, and how Trustees and Judicial Factors appointed by the Court make up a Title.—The circumstances in which the Court may appoint a new trustee or a judicial factor to carry on a trust have already been referred to.[2] When the trust title has been *feudalised*, then trustees or judicial factors appointed by the Court to administer the trust can complete a title to the trust-estate under section 44 of the Conveyancing Act, 1874. Under this section the interlocutor whereby the appointment is made specifies the deeds by which the trust title was completed, and refers to the Registers of Sasines where such deeds are recorded, and also sets forth the lands by description or reference; and an extract of such interlocutor, recorded in the appropriate Register of Sasines, completes the title of the trustee or judicial factor to the estate.

Where person appointed by Court to administer a trust, the trust title being feudalised.

Where person appointed by Court to administer a trust, etc., trust title not having been feudalised.

When a trust title has *not been feudalised*, new trustees and others can complete a title under section 24 of the Titles to Land Consolidation Act, 1868, as amended by section 61 of the Conveyancing Act, 1874. Under these sections, where a judicial factor[3] applies to the Court for authority to complete a title to lands forming part of the estate under his management, either in his own person as judicial factor, or in the person of any pupil, minor, or lunatic to whom he may have been appointed judicial factor, and where the petition or note applying for such authority specifies and describes the lands or refers to the description of them in the form of Schedule (O) of the Conveyancing Act,[4] or of Schedule (G) of the Act of 1868, the warrant granted for completing such title shall also so specify and describe the lands or shall so refer to their description. Where the judicial factor is applying for power to make up a title in his own person, this warrant is held to be a conveyance in his favour; and where he is applying for power to make up a

[1] 37 & 38 Vict., c. 94, s. 43; and see *M'Lean*, 19 R. 1043.

[2] See p. 236, *supra*.

[3] The expression "judicial factor" in the Act of 1868 includes judicial factors, *curators bonis* to persons under incapacity, factors *loco tutoris*, factors *loco absentis*, and all judicial managers; s. 3 (16).

[4] See s. 61.

title in the person of the pupil, minor, or lunatic who is his ward, the warrant is held to be a conveyance in favour of the ward. The title is completed by recording such warrant in the appropriate Register of Sasines. This method is competent for completing a title to an estate vested in a former trustee or judicial factor.

Trustees on religious or educational trust.

Successors in office of trustees infeft for religious and educational purposes do not require to make up title;[1] and successors in office of trustees infeft need not make up new titles if in their case the office of trustee is conferred on the holder of a place or office, or proprietor of any estate, and his successors therein.[2]

Ex officio trustees.

[1] 31 & 32 Vict., c. 101, s. 26. Re-enacting 13 Vict., c. 13, ss. 1 and 3, and 23 & 24 Vict., c. 143, s. 32; and see 31 & 32 Vict., c. 101, c. 113, as to payment of casualties payable by trustees for religious or educational purposes, which section of the Act of 1868 is superseded by the Conveyancing Act, 1874, s. 5.

[2] 37 & 38 Vict., c. 94, s. 45.

Trust Amendment Act 1891 sec 8

If any Trustee is or becomes insane or incapable of acting by reason of physical or mental disability or by continuous absence from U.K. for 6 months or upwards, such Trustee shall on application to Court by any Co-Trustee or any beneficiary be removed from office upon satisfying Court &c.

In case of mortis causa trust, apply to C of S or Sheriff Court from which original Confirm to Trs as Executors was issued — in case of M/C either to C of S or Sh Ct of district in which spouse's or survivor is domiciled

In all other cases in the C of S

CHAPTER IV

ENTAILS

Strict entails.

AN entail, strictly so called, is a disposition of lands containing, in addition to the ordinary feudal clauses of a disposition—(1) an express destination to a special series of heirs; and also (either expressly or constructively) (2) prohibitory clauses against (*a*) alienation, (*b*) contracting debt, and (*c*) altering the order of succession;[1] (3) an irritant clause, which annuls the act prohibited; and (4) a resolutive clause, which annuls the right to the estate of the heir contravening the provisions of the entail.

Statute 1685, c. 22, basis of entail law.

The statute of 1685, c. 22, is the real foundation of our entail law as it now exists.[2]

Essential parts of strict entail—(1) before 1848;

The essential parts of a deed of strict entail before 1848 were a special destination, and the prohibitory clauses against selling, contracting debt, and altering the order of succession, fenced with irritant and resolutive clauses. Prior to 1848 a deed containing a special destination with prohibitory clauses not fenced by irritant and resolutive clauses left the fiar with power to evacuate the destination for onerous consideration, though not gratuitously. The Rutherfurd Act, 1848, however, made an entail which omitted any of the cardinal prohibitions or the irritant or resolutive clause of no avail to prevent the evacuation of the destination onerously or gratuitously.[3]

(2) after 1848;

The Rutherfurd Act made it unnecessary to insert, in any entail dated on or after 1st October 1848, any irritant or resolutive clauses, provided it contained an express clause authorising registration in the Register of Tailzies.[4]

(3) after 1858 and 1860;

The Titles to Land Act, 1858, abolished the need for the

[1] Termed the cardinal prohibitions.

[2] *Hamilton and Others*, March 3, 1815, F.C.; Bell's Lect. ii. 1014; and see *Stormonth*, M. 13,994.

[3] S. 43; see *Duke of Hamilton*, 7 M. 139, aff. 8 M. (H.L.) 48.

[4] S 39.

insertion of prohibitory clauses in any deed of entail of land held feu which contained an express clause authorising registration of the deed in the Register of Tailzies,[1] and the Titles to Land Burgage Act, 1860, also abolished the need for such prohibitory clauses in any deed of entail of land held burgage which contained an express clause authorising registration of the deed in the Register of Tailzies.[2]

(4) after 1858.

The Titles to Land Acts of 1858 and 1860 were repealed by the Act of 1868; but the Act of 1868, consolidating the provisions of the Rutherfurd Act, 1848, and of the two repealed Acts, enacts that, where a deed of entail contains an express clause authorising registration of the deed in the Register of Tailzies, it shall not be necessary to insert *clauses of prohibition* against alienation, contracting debt, and altering the order of succession, *and irritant and resolutive clauses*, or any of them; and that such clause of registration contained in any deed of entail of lands not held by burgage tenure dated on or after 1st October 1858, or of lands held by burgage tenure dated on or after 10th[3] October 1860, shall have in every respect the same operation and effect as if such clauses of prohibition, and such irritant and resolutive clauses, had been inserted in such deed of entail, any law or practice to the contrary notwithstanding.[4]

Mortis causa deed of entail in present form.

Accordingly, a *mortis causa* deed of entail, in its simplest form, usually contains at the present time the following clauses:—

I. Narrative clause.
II. Dispositive clause, containing special destination.
III. Clause containing conditions made by maker.
IV. Assignation to writs.
V. Assignation to rents.
VI. Obligation to relieve lands of debts.
VII. Reservation of granter's liferent, and power to revoke.
VIII. Clause dispensing with delivery.
IX. Clause consenting to registration in the Register of

[1] S. 18.
[2] S. 12.
[3] Act of 1868 says "10th," but should be 1st October 1860.
[4] S. 14.

Entails.—(" And I authorise registration of these presents in the Register of Entails, and grant full power to as my procurators, or to any of the heirs of entail foresaid, to present these presents before the Lords of Council and Session judicially, and procure the same recorded in said Register, and that at the expense of the heir of entail in possession at the time.")

X. Consent to registration for preservation.

XI. Testing clause.[1]

Inter vivos deed of entail in present form.

If the entail is constituted by an ordinary *inter vivos* disposition to be delivered on execution, such disposition will omit as unnecessary the clauses reserving the maker's liferent and power to revoke, and dispensing with delivery.

Registration of entails in the Register of Tailzies.

To the completion of a title under a deed of entail it is, and has always been, necessary not only (1) that the deed constituting the entail should be recorded in the Register of Tailzies under judicial authority obtained by means of a petition presented to the Court of Session, but also (2) that a title to the lands contained in the deed of entail should be properly feudalised.

Infeftment.

Infeftment in the lands under a deed of entail was and is taken in exactly the same way as infeftment under an ordinary conveyance.

How far conditions, etc., of entail could, in taking infeftment, be referred to after 1847 till 1868.

In taking infeftment under a deed of entail, it was necessary, before the Conveyancing Acts of 1847 came into operation, to insert *ad longum*, not only in the first instrument of sasine thereunder, but also in all subsequent transmissions of the lands to heirs, etc., the destination, conditions, provisions, prohibitory, irritant, and resolutive clauses. Power, however, was given by the Conveyancing Acts of 1847 and subsequent Acts[2] to refer to these clauses of a deed of entail in renewals of the investiture. The deed of entail itself must, however, contain either the conditions, etc., or their statutory equivalent.[3]

How conditions of entail may now (*i.e.*, since 1868) be referred to in renewing investiture, etc.

The Titles to Land Consolidation Act, 1868,[4] repealing these

[1] Jur. Styles, i. 200.

[2] 10 & 11 Vict., c. 47, s. 5; 10 & 11 Vict., c. 48, s. 4; 10 & 11 Vict., c. 49, s. 3; 10 & 11 Vict., c. 51, s. 26; 21 & 22 Vict., c. 76, s. 17; 23 & 24 Vict., c. 143, ss. 11, 27.

[3] Bell's Lect. ii. 1024, and see, *e.g.*, *Kenny*, 2 R. 636.

[4] S. 9.

Acts, settled the law relating to the incorporation by reference of the destination and fetters of entails. It enacted as follows: —It shall not be necessary in any conveyance or deed [1] (*a*) of or relating to lands held under a deed of entail, or (*b*) of or relating to lands obtained by excambion [2] in exchange for lands held under any deed of entail, or (*c*) of or relating to lands purchased or acquired for the purpose of being added to any estate held under any deed of entail, or entailed on the heirs and under the conditions specified in any deed of entail, to insert the destination of heirs, or the conditions, provisions, and prohibitory, irritant, and resolutive clauses, or clause authorising registration in the Register of Tailzies, contained in any such deed of entail; provided the same shall in such conveyance or deed be specially referred to as set forth at full length in such deed of entail recorded in the Register of Tailzies, if the same shall have been so recorded, or as set forth at full length in any conveyance or deed recorded in the appropriate Register of Sasines, and forming part of the progress of title-deeds of the said lands held under such deed of entail, such reference being made as nearly as may be in the terms set forth in schedule (C) annexed to the Act.

Entailable subjects.

The Act of 1685 makes it lawful to entail "lands and estates," and a strict entail binding between heirs and third parties can be constituted only of subjects admitting of infeftment.[3] Moveables cannot be entailed even *inter hæredes*.[4] Funds held in trust and directed to be entailed are treated as entailed land, and funds obtained by the sale of entailed estate are, in certain circumstances, treated as surrogates for the lands sold.[5]

Title of entailer.

The maker of an entail has usually a feudalised title, but a person having merely a personal title [6] can make a valid entail.[7]

Essentials of an effectual tailzied destination.

An effectual tailzied succession (*a*) must be to a special

[1] This term includes practically every writing used to complete or convey or discharge a title to lands or rights in lands (sec. 3 (7)).

[2] Even before 1868 excambions did not require to contain destination and fetters.

[3] See, *e.g.*, *Brown*, 8 M. 702.

[4] *Kinnear*, 4 R. 705; *Sandys*, 25 R. 261; and see *Kinnear*, 2 R. 765; *Gordon*, 4 M. 501; *Marquis of Bute*, 8 R. 191; *Adam's Trs.*, 1 F. 1042; and as to leases, see Bell's Lect. ii. 1020; Rankine on Land-Ownership, 600; and 11 & 12 Vict., c. 36, s. 49.

[5] See, *e.g.*, 11 & 12 Vict., c. 36, ss. 25 to 28; 16 & 17 Vict., c. 94, s. 8; 45 & 46 Vict., c. 53, s. 23; and see p. 259, *infra*.

[6] *Lord Napier*, 5 Br. Sup. 888, aff. 2 Pat. 108.

[7] See *M'Adam*, 6 R. 1256.

class of heirs, and the institute and the substitutes must be either named or designed as those constituting a recognisable group of heirs, because the object of the statute of 1685 is to enable the makers of entails to transmit their estates to a series of heirs different from that of the legal order of succession, and the statute does not make it competent by an entail to substitute simply the heirs whomsoever of any person; and (*b*) must be without division, because the law is that the fetters of an entail become inoperative wherever the succession opens to heirs-portioners in the absence of a provision for excluding such heirs, and that such a provision is not to be inferred from implication in an executed entail.[1]

Where restraining clauses do not affect institute.

In the common form of a tailzied destination, the maker of the entail is named as institute; but this is not essential. If the restraining clauses of an entail are directed against "the heirs of entail,"[2] or "the heirs of entail, or any of them,"[3] or "heirs and members of entail,"[4] such clauses do not affect the institute,[5] or a proper conditional institute,[6] even although a liferenter has held a fiduciary fee for him until he came into existence;[7] but they affect a constructive conditional institute,[8] although he is entitled to make up a title as disponee.[9] Where, however, the fettering clauses have been directed against "each and every heir or person contravening,"[10] or "the person or persons, heirs of tailzie foresaid,"[11] or where they have been directed against all deeds in contravention of them, "without mentioning heirs, or only mentioning them in such a way that the words may be treated as surplusage,"[12] they have been held to comprehend institutes of all sorts as well as substitutes, because that is their clear import.

[1] *Farquhar*, 1 D. 121; *Macdonald*, 5 D. 372; *Craig*, 1 D. 545; *Mure*, 15 S. 581, aff. 3 S. & M'L. 237; *Hunter*, 13 S. 185; *Earl of March*, M. 15,412, aff. 2 Pat. 49; *Collow's Trs.*, 4 M. 465; *Connell*, 5 M. 379; Bell's Prin. 1723; *Mowbray's Trs.*, 22 R. 801, M'Laren, i. 492; and see H.R. p. 708 *et seq.*

[2] *Edmondstone*, M. 4409, rev. 2 Pat. 255; *Leslie*, Elch. "Tailzie," No. 49; *Lord Elibank*, 11 S. 858, aff. 1 S. & M'L. 1; *Brown*, 15 S. 837, aff. 3 S. & M'L. 84; *Morehead*, 11 S. 863, aff. 1 S. & M'L. 29; *Campbell*, 1 D. 81, aff. 2 Rob. 109; *Maxwell*, 15 S. 291, aff. M'L. & Rob. 790.

[3] *Miller*, M. 15,471.

[4] *Steele*, May 12, 1814, F.C., aff. 5 Dow 72, 6 Pat. 322.

[5] See p. 192, *supra*.

[6] See p. 193, *supra*.

[7] *Maxwell*, *supra*.

[8] See p. 193, *supra*.

[9] See p. 193, *supra*.

[10] *Douglas & Co.*, 2 S. 487, aff. 1 W. & S. 323.

[11] *Syme*, M. 15,473; aff. 4 Pat. 471.

[12] M'Laren, i. 502; and *Buchanan*, 16 S. 358, aff. 3 Bell 342; *Lindsay*, 3 Bell 254; *Seton*, 16 D. 658; *Gordon*, 4 M. 501.

Destinations in entail not subject to malignant construction.

Although fetters in entails are strictly construed, the rules for construing destinations in them are the same as those which apply to destinations in other deeds. In other words, in construing destinations there does not fall to be adopted the strict principle of construction applicable to fettering clauses, and the meaning of the entailer in the use of words employed by him is to be sought.[1]

Description of lands in entails.

Deeds of entail must contain such a description of the subjects disponed as, if contained in any ordinary disposition, would permit infeftment *de plano* under it. A description in general terms[2] is not enough. But if an estate in an entail is not described in general terms, but the description of it is alleged to be ambiguous, resort can be had to extrinsic evidence for the purpose of removing the ambiguity—as, for example, to show that the barony of Monimail is the barony of Melville under a different name.[3]

Conditions and provisions of entail.

The statute of 1695 enacts that such "provisions and conditions" may be inserted in entails as the makers of them shall think fit. Such "provisions and conditions" are now made part of the dispositive clause.[4] Among the "provisions and conditions" of the kind contemplated by the statute are these —(*a*) payment of annuities or other payments to certain persons;[5] (*b*) a clause of devolution providing, for example, that when the heir of entail succeeds to another specified estate the succession to the entailed lands shall devolve upon a younger son of the heir, or a descendant of such younger son, instead of the eldest son, should he succeed to the other estate;[6] (*c*) a condition that the heirs of entail shall use and retain, after the succession to the entailed estate shall open to them respectively, a particular surname, arms, and designation;[7] (*d*) a condition that the entailed estate shall not be subject to any terce or courtesy of the widow or widower of any of the heirs of entail.[8] These conditions, or similar conditions, if fenced expressly or

Examples of conditions, etc., of entail.

1 M'Laren, i. 487.

2 *King*, 6 D. 821, aff. 5 Bell's App. 82.

3 *Earl of Leven and Melville*, 23 D. 1038; M'Laren, i. 480.

4 See Jur. Styles, i. 201 *et seq.*

5 Jur. Styles, i. 202.

6 See Jur. Styles, i. 203, and Bell's Lect. ii. 1018, on such a clause.

7 Jur. Styles, i. 204; see *Hunter*, 9 R. 492.

8 *Ibid.*; for other conditions found in an entail see Jur. Styles, i. 203 *et seq.*

constructively with irritant and resolutive clauses, and if not contrary to morality or general policy, or the policy of the Entail Statutes,[1] will be enforced in the same way as the three substantive prohibitions against alienation, contracting debt, and altering the order of succession.

Cardinal prohibitions and irritant and resolutive clauses.

The Act of 1685 required three substantive or, as they are often named, cardinal prohibitions—(*a*) a prohibition against alienation; (*b*) a prohibition against contracting debt; and (*c*) a prohibition against altering the order of succession prescribed by the entailer; and these prohibitions had to be fenced by irritant and resolutive clauses. The law from 1685 to the passing of the Rutherfurd Act, 1848, was, that if an entail was defective in one or more of the prohibitions, an heir of entail could do the act or acts ineffectually prohibited, but that he had to respect the entail in so far as it was not defective.[2] From 1685 to 1848 it was necessary to fence the prohibitions against alienation and against contracting debt by express irritant and resolutive clauses; but during that period a prohibition against altering the order of succession, although not so fenced, was effectual *inter hæredes*, and accordingly was effectual to restrain alienation by gratuitous deed, *inter vivos* or *mortis causa*, but ineffectual against onerous singular successors.[3]

Law before and after 1848.

Rutherfurd Act made entail invalid in one prohibition invalid as regards all.

Since the passing of the Rutherfurd Act, 1848,[4] however, an entail invalid in regard to any one of the three cardinal prohibitions, including a defect in or omission of the fencing clauses applicable to the prohibition against altering the order of succession,[5] is invalid as regards all the prohibitions, even *inter hæredes*.

Rules regarding prohibitory, etc., clauses.

Prohibitory, irritant, and resolutive clauses do not require now to be inserted *ad longum* in deeds of entail; but in deciding whether an entail in the old form is valid these general rules are important:—

(1) Must be applicable to estate and to every heir of entail.

(1) The prohibitory, irritant, and resolutive clauses must each and all be expressed so as to be clearly applicable (*a*) to the entailed estate,[6] and (*b*) to all the

[1] Rankine on Land-Ownership, 602.

[2] See M'Laren, i. 496, and cases there cited.

[3] *Buchanan*, 3 Bell's App. 342; *Lindsey*, 2 M. 249; M'Laren, i. 498.

[4] S. 43.

[5] *Duke of Hamilton*, 7 M. 139, aff. 8 M. (H.L.) 48.

[6] See *Earl of Leven and Melville*, 23 D. 1038; M'Laren, i. 499.

persons who are intended to be bound by them.[1] (2) Nothing is to be read into the prohibitory, irritant, and resolutive clauses by implication.[2] (3) If an entail contains two prohibitory clauses against the same acts, the one defective, the other distinct and unequivocal in itself, the latter will receive effect;[3] but a cardinal prohibition is not validly framed if the act alleged to be prohibited is only prohibited inferentially—as, for example, where the heirs of entail were forbidden "to sell off or dispose upon any part of the lands and subjects before transmitted, nor to contract debt, or *do any other deed whereby the said lands and subjects may be adjudged or evicted from the succeeding members of entail, or their hopes of succession thereto in any measure evaded.*"[4] Here the prohibition against altering the order of succession was held to be merely inferential, and therefore invalid. (4) (*a*) If to a prohibitory clause, stating distinctly various things that are prohibited, there is added an irritant or a resolutive clause, which, beginning with general words of reference, proceeds to particularise or enumerate only some of the things prohibited, then the concluding words of the clause declaring the irritancy or forfeiture are in construction confined to the things so particularised or enumerated;[5] and (*b*) if to a prohibitory clause having numerous prohibitions there is added an irritant or a resolutive clause, which makes a repetition of some of the things prohibited, and concludes with general words, not being words of reference, the general words are held to comprehend only things *ejusdem generis* with those repeated;[6] but (*c*) if an irritant or a resolutive clause is framed solely on the principle of reference, or opens with an enumeration of some of the things prohibited to the prohibitory clauses, and concludes with general words, being words of reference, the words of reference to things previously mentioned are equivalent to a repetition of the things so referred to, and the effect is the same as if

(2) Nothing read into clauses, prohibitory or fencing, by implication.

(3) Prohibition must not be inferential or consequential.

(4) (*a*) General words followed by incomplete enumeration.

(*b*) Incomplete enumeration followed by general words not referential.

(*c*) Incomplete enumeration followed by general words of reference.

[1] See H.R. 725–6, and cases there cited.

[2] *Edmondstone*, M. 4409, rev. 2 Pat. 255; *Earl of Kintore*, 23 D. 1105, aff. 1 M. (H.L.) 32, 4 Macq. 520.

[3] See Lord Deas in *Bontine*, 2 M. 918.

[4] *Lang*, M'L. & Rob. 871 (in which *Maclaine*, M. "Tailzie," App. No. 14, was declared to be no longer law); and compare *Monypenny*, M'L. & Rob. 898; *Rowe*, 15 S. 500.

[5] M'Laren, i. 528; *Earl of Kintore, supra*; see *e.g. Fairlie*, 19 D. 596; *Bruce*, M. 15,539, aff. 4 Pat. 231; *Rennie*, 3 S. & M'L. 142; *Thomson*, 1 D. 592; *Scott*, 18 D. 168; *Fraser*, 7 R. 134.

[6] M'Laren, i. 526; *Earl of Kintore, supra*.

everything prohibited had been expressly mentioned in the concluding portion.[1] (5) The prohibitory, the irritant, and the resolutive clauses must be complete in themselves, so that the sense is expressed without the necessity of reference to other instruments containing corresponding provisions,[2] subject to this qualification, that if the deed be not an original deed of entail, but a deed relating to lands acquired for the purpose of being added to any entailed estate, it may have incorporated into it by reference, in terms of section 9 of the Titles to Land Consolidation Act, 1868, such clauses contained in such original deed of entail. (6) If not authenticated *habili modo*, alterations *in substantialibus*, words written on erasure,[3] interlineations, or marginal additions are held *pro non scriptis*, because they are presumed to have been made after the execution of the deed; and if the remaining words in the clause in which the erasures, etc., occur do not contain a sufficient expression of the proper effect of the clause, according to a strict construction, the clause will be inept, and the consequence may be that the deed will be void.[4]

(5) Deeds of entails must be complete in themselves.

(6) Erasures, etc., not authenticated may invalidate entail.

Contravention of entails.

On a contravention of the entail by an heir in possession, the next heir is entitled, by the statute of 1685, "to pursue declarators thereof, and serve himself heir to him who died last infeft in the fee and did not contravene." A contravening heir forfeits for himself alone,[5] and not also for his descendants, unless the entail expressly so stipulates.[6] Any substitute is entitled on contravention to procure a declarator of irritancy even without calling intermediate heirs as parties to the action,[7] unless the irritant and resolutive clause affects not only the contravening heir, but also the heirs of his body, in which case the latter have no title to sue.[8] The consequences of contravention cannot be enforced after the death of the contravener, even

1 Lord Chancellor Westbury in *Earl of Kintore*, 23 D. 1105, aff. 1 M. (H.L.), 32, 4 Macq. 520; and see *M'Donald*, 1 R. 858, aff. 2 R. (H.L.) 28; and *Speirs*, 5 R. 923; *Wallace*, 7 R. 902.

2 *Kenny*, 2 R. 636.

3 See *Boswell*, 14 D. 378.

4 M'Laren, i. 511, and cases there cited.

5 *Gordon of Carleton's Creditors*, M. 15,384.

6 See *Bontine*, 15 S. 711, aff. 1 Rob. App. 347.

7 *Simpson and Home*, M. 15,353; *Irvine*, M. 15,369; *Dundas*, M. 15,430.

8 *Gilmour*, M. App. "Tailzie," No. 9; *Gordon of Carleton's Creditors, supra*; and see *Turner*, M. App. "Tailzie," No. 16, aff. 1 Dow's App. 423.

although the entail includes not only him but his descendants in the forfeiture.[1]

Purgation of contraventions.

An heir who has contravened is, in answer to an action to have the contravention declared, entitled to purge the irritancy by performing the stipulated condition, or getting the extinction of an *ultra vires* deed.[2]

Reduction of contravening deeds.

The view taken is that deeds contravening an entail are effectual until set aside, but heirs-substitute can reduce them before as well as after the death of the contravener.[3]

Effect of deeds granted after contravention, but before declarator of irritancy.

It sometimes happens that an heir of entail grants, after contravening an entail, but before action of irritancy has been raised against him, competent deeds. A decree of irritancy does not operate to cut down such deeds.[4]

Entail (*a*) before registration and infeftment.

In the case of an entail which has been neither recorded nor followed by infeftment, and the heir in possession is the heir of the last investiture, then the estate is subject to adjudication for debts contracted by him at any time before the recording of the entail.[5] Such heir can sell,[6] and he is neither bound to reinvest the purchase-money,[7] nor liable in damages for acts done in contravention of the entail.[8] But where the heir in possession is a stranger, the restraining clauses affect him as well as his creditors, singular successors, and tenants, on the principle that, as his only title to the lands is the personal title, he and they must take the personal right *tantum et tale*; he can sell, and they may take his life estate only.[9]

(*b*) After registration, but before infeftment.

When an entail is recorded in the Register of Entails, but not followed by infeftment, the heir in possession, when he is the heir of line of the last investiture, can make up titles as heir of that investiture and sell the estate;[10] and his creditors can attach the estate by adjudication if they obtain decree of

[1] *Mackay*, M. 11,171; *Turner*, *supra*; *Maxwell*, 6 D. 255, aff. 5 Bell 165.

[2] See *Gordon*, M. 7281; *Ross*, M. 7289; *Abernethie*, 15 S. 1167, aff. 1 Rob. App. 434 (where fee-simple titles made up); *Mackay*, M. 11,171.

[3] *Mordaunt*, March 9, 1819, F.C., aff. 1 Sh. App. 169; *Queensberry's Executors*, July 6, 1820, F.C., aff. 1 Sh. App. 59; *Agnew*, June 23, 1813, F.C.; *Turner*, *supra*.

[4] 11 & 12 Vict., c. 36, s. 40.

[5] *Douglas*, M. 15,616; *Russell*, M. 10,300; *Rose*, 6 S. 945, aff. 5 W. & S. 359; *Ross*, 14 S. 453; M'Laren, i. 536.

[6] *Grahame*, 8 S. 231.

[7] *Earl of Eglinton*, 4 D. 425, aff. 2 Bell's App. 149.

[8] *Marquis of Queensberry*, 6 S. 706, rev. 4 W. & S. 254.

[9] M'Laren, i. 537, and cases there cited, and Bell's Lect. ii. 1044.

[10] *Kennedy*, 7 S. 397.

adjudication before infeftment under the entail.[1] The mere recording of the entail in the Register of Entails does not affect the position of an heir of entail in possession who is a stranger to the last investiture.[2]

(c) After infeftment, but before registration.

Again, an entail may have been followed by infeftment, but may not have been recorded in the Register of Entails. In such a case, the heir of entail in possession, whether heir of the last investiture or a stranger, is treated as feudal proprietor and can sell the estate; and his creditors can attach it.[3]

Heir limited fiar.

It is well settled that an heir in possession under a strict entail is a fiar limited by the fetters of the deed of entail, as opposed to a liferenter; and that the only measure of right and liability between him and the next succeeding heir is to be found in the express prohibitions of the entails.[4] He is not bound by the personal contracts of his predecessor.[5] An heir of entail in possession can, at common law, do ordinary acts of administration; but his common law powers are often enlarged by the entail; and they have been enlarged and defined by the Entail Statutes following the statute of 1685, c. 22.[6]

(a) Disentailing under statute.

The Rutherfurd Act, 1848, first conferred on heirs of entail in possession the power of disentailing entailed estates. That Act has been amended and extended.

When heirs can disentail without or with consent.

An heir of entail in possession, being of full age, *capax*, and not debarred by marriage-contract,[7] may at the present time disentail and acquire in fee-simple the entailed estate, in whole or in part, under the authority of the Court, as follows:—(1) Without consent when he is the only heir of entail in existence,[8] *whether the entail is an old* (i.e., *dated before 1st August* 1848) *or a new* (i.e., *dated on or after 1st August* 1848) *entail, and irrespective of the date of his birth.*[9] (2) Without consent when he was born on or after 1st August 1848 *in the case of an old entail*,[10] or when he was born after the date of the entail *in the*

[1] *Douglas* and *Russell*, *supra*.
[2] See p. 74, *supra*.
[3] M'Laren, i. 536; Bell's Lect. ii. 1044.
[4] See, *e.g.*, Lord President Inglis in *Earl of Breadalbane*, 4 R. 667, at p. 672.
[5] *Earl of Galloway*, 4 F. 851; *Lord Sempill*, 5 F. 868; *Gillespie*, Feb. 20, 1908.
[6] For summary of later statutes, see H.R. 736 *et seq.*
[7] See p. 258, *infra*.
[8] *Gordon*, 13 D. 954, 14 D. 269; *Bruce Gardyne*, 11 R. 60.
[9] 11 & 12 Vict., c. 36, s. 3; 38 & 39 Vict., c. 61, ss. 4, 5 (3); 45 & 46 Vict., c. 53, s. 3.
[10] 11 & 12 Vict., c. 36, s. 2.

case of a new entail.[1] (3) When he was born before 1st August 1848, with the consent of the heir next in possession, being (*a*) his heir-apparent under the entail, and (*b*) born on or after 1st August 1848, (*c*) of the age of twenty-one years complete at the time of granting consent, and (*d*) not subject to any legal incapacity, *in the case of an old entail*;[2] and when he was born before the date of a new entail, with the consent of the heir next in succession, being (*a*) his heir-apparent under the entail, and a person (*b*) of the age of twenty-one years complete, (*c*) not subject to legal incapacity, and (*d*) born after the date of the entail, *in the case of new entails*.[3] The heir-apparent under an entail is, in the sense of the Entail Statutes, the heir who is next in succession to the heir in possession, and whose right of succession, if he survive, must take effect.[4] (4) When he obtains *either* (*a*) the consents of the whole heirs of entail, if there be less than three in being at the date of such consents and at the date of the first interlocutor under the application to the Court for power to disentail; *or* (*b*) the consents of the three nearest heirs who at these two dates are for the time entitled to succeed to the estate in their order successively immediately after him; or (*c*) the consents of the heir-apparent under the entail, and of the heir or heirs, in number not less than two, including the heir-apparent, who in order successively would be heir-apparent, *whether the entail is an old or a new entail, and irrespective of the date of his* (i.e., *the heir in possession*) *birth*. In these three cases, (*a*), (*b*), (*c*), the nearest heir for the time entitled to succeed immediately after the heir in possession requires to be (*a*) of the age of twenty-one years complete, and (*β*) not subject to any legal incapacity.[5]

In connection with the powers of disentailing given by the Entail Acts to heirs of entail in possession, it has to be kept in view (*a*) that an heir in possession must, before he can exercise such powers, be not only major, but also *capax*, and that, if he is not *capax*, his curator or other administrator is not entitled

Heir applying for disentail must be major and *capax*.

[1] 11 & 12 Vict., c. 36, s. 1.
[2] 11 & 12 Vict., c. 36, s. 2; 38 & 39 Vict., s. 4; and see 45 & 46 Vict., c. 53, s. 12.
[3] 11 & 12 Vict., c. 36, s. 1; 38 & 39 Vict., c. 61, s. 4; and see 45 & 46 Vict., c. 53, s. 12.
[4] 11 & 12 Vict., c. 36, s. 52; and see *Forbes*, 15 R. 797.
[5] 11 & 12 Vict., c. 36, s. 3; 38 & 39 Vict., c. 61, ss. 4, 5 (3); 45 & 46 Vict., c. 53, s. 3.

to make application to the Court for authority to *disentail* the entailed estate, in whole or in part;[1] (*b*) that an heir in possession, although of full age and *capax*, may yet be disabled by marriage-contract from disentailing;[2] (*c*) that the consent of any heir of entail, either in nonage or labouring under other legal incapacity, can be given through a curator *ad litem*;[3] (*d*) that if any heir or his curator *ad litem* fails or refuses to consent to any application for disentail by the heir in possession, the Court has power to dispense with such consent,[4] his expectancy or interest having been valued, and the amount paid into the bank or secured, and the interest of any creditor who may have lent him money on the security of such expectancy, or of his wife or children to whom he has granted provisions under the Entail Acts, having been provided for, if such creditor or wife or children oppose the application; (*e*) that the Court may grant authority to a factor *loco absentis* to an heir in possession who has disappeared, to execute an instrument of disentail,[5] and may dispense with the consent of an heir who is absent or cannot be found;[6] (*f*) that the Court have power to force disentail when debt has been contracted by the heir in possession after the passing of the Entail Act, 1882, on application made by a creditor or by the trustee on the sequestrated estate of the heir in possession.[7]

Not disabled by marriage-contract.

Consent of heir in nonage or *incapax*.

Dispensing with consent.

Factor to absentee.

Disentail for debt contracted after 1882.

Petition for disentail.

A petition for authority to disentail is presented in the Bill-Chamber to the Junior Lord Ordinary, and during vacation or recess to the Lord Ordinary on the Bills. It may crave either authority to execute an instrument of disentail, or approval of an executed instrument of disentail, and in practice the prayer is usually to approve of an instrument of disentail executed before the prayer is granted.[8] Along with it is lodged an affidavit or a schedule signed by the petitioner and deponed to by him as correct, setting forth any debts or provisions

Schedule of debts.

1 45 & 46 Vict., c. 53, s. 11; 38 & 39 Vict., c. 61, s. 12 (2).

2 11 & 12 Vict., c. 36, s. 8; 45 & 46 Vict., c. 53, s. 17; and see *Pringle*, 18 R. 895.

3 45 & 46 Vict., c. 53, ss. 11, 12.

4 38 & 39 Vict., c. 61, ss. 4, 5; 45 & 46 Vict., c. 53, s. 13; *Pringle*, 19 R. 926; *Pringle*, 18 R. 895; *De Virte*, 5 R. 328; *M'Donald*, 6 R. 521, 6 R. 869, rev. 7 R. (H.L.) 41; *Sprot*, 19 S.L.R. 738; *Bankes*, 1 F. 1194.

5 45 & 46 Vict., c. 53, s. 14; 54 & 55 Vict., c. 29, s. 8.

6 45 & 46 Vict., c. 53, s. 15.

7 *Ibid.* s. 18.

8 16 & 17 Vict., c. 94, s. 4; 38 & 39 Vict., c. 61, s. 12.

affecting the estate or the heirs of entail which are not secured by having been placed on the record.[1]

Service of applications for disentail, etc.

It is not essential to serve the petition on heirs whose consents are not required, but the practice is to serve it on the three next heirs entitled to succeed,[2] whether their consents are required or not. Section 32 of the Rutherfurd Act, 1848,[3] deals with the form and the effect of an instrument of disentail, and the registration thereof in the Register of Tailzies.

Evacuation of destination.

Though after the recording of the instrument of disentail the disentailer can undoubtedly evacuate the destination in the entail, yet, if he does not evacuate it, the estate, on his death, will fall to the next substitute.[4]

How valid entail extinguished at common law.

(1) Heirs exhausted, or last substitute succeeds.

(2) Succession of heirs-portioners.

(3) Prescription on adverse title.

A valid entail may come to an end at common law in one of these ways:—(1) Entails come to an end either when all the heirs of entail are dead,[5] or when the estate comes to be possessed by the last person called under the deed as an heir of entail. (2) When heirs-portioners, in the absence of a clause excluding them, succeed under the destination, the entail comes to an end.[6] (3) An entail also comes to an end by prescriptive possession either on a fee-simple title or on a title which is made up in virtue of the entail, but in which the fetters of the entail have not been inserted either *ad longum* or by reference,[7] or on an entail of later date.[8]

Money derived from sale, etc., may be treated as entailed estate.

(1) Where money has been derived from the sale of an entailed estate, or of any interest in it, or where money has been invested in trust for the purpose of purchasing lands to be settled on the series of heirs entitled to succeed to an entailed estate, and where the heir in possession of such entailed estate could *acquire the estate in fee-simple* by recording an instrument of disentail, he may make application to the Court to grant authority for payment to him of such sums of money as belonging to himself in fee-simple.[9] (2) Where any

Money, etc., vested in trust for the purchase of land to be entailed may be dealt with as if it were entailed land.

[1] 38 & 39 Vict., c. 61, s. 12 (5); and see 11 & 12 Vict., c. 36, s. 6, and 16 & 17 Vict., c. 94, s. 1194.

[2] See *Davys*, 9 M. 44; *Malcolm*, 6 S.L.T. No. 321.

[3] 11 & 12 Vict., c. 36.

[4] *Gray*, 5 R. 820; but see *Bruce*, 1 R. 740.

[5] *Henry*, 10 S. 644.

[6] See Bell's Lect. ii. 1048, and authorities there cited.

[7] *Cathcart*, 8 D. 970; *Holmes and Campbell*, 13 D. 689.

[8] *Inglis*, 14 D. 54; *Earl of Eglinton*, 4 D. 425, aff. 2 Bell's App. 149; *Stewart*, 6 D. 1073, aff. 5 Bell's App. 139.

[9] 11 & 12 Vict., c. 36, s. 26.

money or other property has been invested in trust for the purpose of purchasing land to be entailed, or where any land has been directed to be entailed, then if the person who would be the heir in possession if the directions had been carried out could have acquired the entailed land in fee-simple by executing and recording an instrument of disentail, he may make summary application to the Court for authority for the payment to him of such money, or for the conveyance to him of such land in fee-simple.[1]

Feuing an alienation at common law.

The cardinal prohibition against alienation prevents, at common law, an heir in possession of an entailed estate from granting feus, even for a sufficient feu-duty,[2] but the prohibition may be qualified. If, however, an entail contains a power to grant feus, such a power must be exercised with a view to the rational and fit management of the estate.[3]

Power to feu in entail, how construed.

Long leases an alienation at common law.

Similarly, the cardinal prohibition against alienation prevents, at common law, an heir in possession of an entailed estate from granting leases of more than ordinary duration,[4] or from leasing in consideration of a grassum in addition to the rent,[5] or from letting the mansion-house and pertinents beyond his lifetime;[6] but the prohibition may be qualified by a power to grant leases for more than ordinary endurance, and, it may be, at not less than a certain rent.[7]

Power to lease may be given by entail.

Feus and long leases may be granted with the consents, if any, necessary for disentailing.

On the principle that the greater includes the less, it is now competent for an heir in possession of an entailed estate, whether the entail is an old or a new one, to grant feus and long leases, all in like manner and with the like consents (if any) as in the case of a disentailing.[8] Over and above this general power, the Entail Statutes contain provisions for the exercise of various powers of feuing and leasing.

Leases under Montgomery Act 1770.

The Montgomery Act, 1770, gives proprietors of entailed estates power to grant leases (*a*) for fourteen years, and the life of one person alive at the date of the lease; (*b*) for the

[1] 11 & 12 Vict., c. 36, s. 27; and see *Black*, 1 R. 133; *Craig*, 13 R. 603.

[2] *Cathcart*, M. 15,399, aff. 1 Pat. 618.

[3] *Innes*, M. App. "Tailzie," Nos. 13 and 18; rem. 5 Pat. 609; adhered to June 17, 1813, F.C.; aff. 2 Dow 149, 5 Pat. 768.

[4] *Innes, supra*; *Eliott*, M. 15,542, March 10, 1814, F.C., 1 Sh. App. 16, 89.

[5] *Ibid.*

[6] *Cathcart, supra.*

[7] See *Earl of Elgin*, 1 Sh. App. 44.

[8] 11 & 12 Vict., c. 36, s. 4; 16 & 17 Vict., c. 94, s. 13; 38 & 39 Vict., c. 61, s. 6; 45 & 46 Vict., c. 53, s. 4; and see *Campbell*, 20 S.L.R. 474; *Scott Plummer*, 12 R. 1439; and see p. 256, *supra*.

lives of two persons alive at the date of the lease, and the survivor; or (*c*) for thirty-one years, on condition that certain obligations for the improvement of the portion of the estate let are imposed on the tenant.[1]

Leases under Rosebery Act.

The Rosebery Act, 1836,[2] allows an heir of entail in possession (without any judicial authority) to grant tacks of any parts of the entailed lands, for the fair rent of such lands at the period of letting, either by public auction or private bargain, and notwithstanding any prohibition against diminution of rental in the entail,[3] for twenty-one years, and to grant tacks of any mines and minerals contained in the lands, for thirty-one years.[4]

Of lands for twenty-one years.

Of minerals for thirty-one years.

Entail Sites Act, 1840.

The Entail Sites Act, 1840,[5] authorises an heir of entail in possession either to feu or to let for any period of endurance, for such yearly feu-duty or rent as may be agreed upon, though below the just value, with the sanction of the Sheriff of the county within which the entailed land lies, small portions of the entailed estate as the sites of places of public Christian worship and schools, and for burying-grounds and playgrounds for such places of public worship and schools respectively, and also for dwelling-houses and gardens for the ministers and schoolmasters thereof respectively.

Feus or leases for sites of churches, etc., of limited extent.

Subject to approval of Sheriff.

Rutherfurd Act.

Under the Rutherfurd Act, 1848,[6] as amended by the Entail Acts of 1875[7] and 1882,[8] it is competent, as already stated,[9] for an heir of entail to lease and feu the estate, *in whole or in part*, after the same procedure as he would use with a view to disentail.[10]

Feus of whole or part with consents and sanction of the Court.

It is also competent by the Rutherfurd Act, 1848,[11] for an heir of entail in possession under an old entail, on notice to the next heir of entail, and with the approbation of and at the sight of the Court,[12] to grant feus or long leases[13] of any part

Feus not exceeding one-eighth in value of estate under Rutherfurd Act, 1848.

1 10 Geo. III., c. 51, ss. 1, 2, 3.
2 6 & 7 Will. IV., c. 42, s. 2.
3 See 45 & 46 Vict., c. 53, s. 8.
4 See as to mineral lease *Muirhead*, 17 D. 875.
5 3 & 4 Vict., c. 48, ss. 1, 2, 3, 4.
6 S. 4.
7 S. 6.
8 S. 4.
9 See p. 260.
10 See *Campbell*, 20 S.L.R. 474; *Christie*, 15 R. 793, and see p. 256, *supra*; *Scott Plummer*, 12 R. 1349. As to conditions see *Christie*, *supra*; *Macdonald*, 19 D. 506.
11 S. 24.
12 Or Sheriff in the case of leases; 45 & 46 Vict., c. 53, s. 5.
13 Not necessarily by public roup: *Hastings*, 12 D. 918.

of the entailed estate, *not exceeding one-eighth part in value*, for the highest feu-duty or rent that can be got for the same.

Entail Act, 1853, authorises Court to fix rents and feu-duties and form of feu-charters, feu-contracts and leases.

The Entail Act, 1853,[1] empowers the Court to fix the minimum rates of rent or feu-duty at which any particular lands may be feued or let under the last-mentioned provision of the Rutherfurd Act, and to fix the form of the feu-contract, feu-charter, or lease.

Entail Act, 1853, extends provisions of Rutherfurd Act to new entails, not containing express prohibition against feuing or leasing.

The Entail Act, 1853,[2] also provides that where any tailzie executed after 1st August 1848 does not expressly prohibit the granting of feus or building leases, *though containing a prohibition against alienation and long leases generally*, the heir of entail in possession shall have the same powers of granting feus and building leases for more than twenty-one years, as are by section 24 of the Rutherfurd Act or by any other Act of Parliament[3] conferred on heirs of entail in possession under old entails.

Entail Amendment Act, 1868; leases or feus for building purposes of any part of entailed estate.

The Entail Amendment Act, 1868,[4] confers powers of granting leases not exceeding ninety-nine years in duration, or feus or contracts of ground-annual, for the purpose of building. The feu-duty, rent, or ground-annual to be stipulated for must be fixed by one or more skilled persons named by the Sheriff; and

Conditions.

buildings of the annual value of, at the least, double the feu-duty, rent, or ground-annual must be built within five years from the date of the grant, and must be kept in good tenantable and sufficient repair.

Entail Act, 1882.

The Entail Act, 1882, besides providing that an heir in possession under a new entail may feu or lease, etc., with such consents as are necessary in the case of an old entail,[5] specially empowers the Court of Session or the Sheriff to authorise the

Leases for scientific purpose.

granting of a feu or a lease of a portion of an entailed estate not exceeding two acres in extent for a scientific purpose, or other purpose of public utility, even if the yearly feu-duty or rent agreed upon is inadequate and below the just value.[6]

Leases may be granted at diminished rent.

The Act of 1882 also allows an heir of entail in possession under an entail prohibiting leases involving a diminution of

1 S. 6.
2 S. 13.
3 See, *e.g.*, 10 Geo. III., c. 51.
4 Ss. 3–5.
5 See pp. 257, 261, *supra*.
6 S. 6 (2).

rental to grant leases at a fair rent,[1] and an heir of entail in possession may, at any time within two years previous to the expiry of a lease for not less than seven years, grant a new lease at a fair rent, to begin at the expiry.[2]

Lease may be renewed two years before expiration.

A power to excamb may be contained in a deed of entail.[3] The power to excamb such parts of an entailed estate as the heirs of entail may think expedient can be exercised only to such an extent as is consistent with the subsistence of the entail over the bulk of the estate.[4]

How power to excamb in entail construed.

By statute various powers of excambion have been conferred on heirs of entail.[5]

An heir of entail in possession is not entitled, at common law, unless the entail enables him to do so, to burden either the entailed estate or the heirs succeeding to him with the expense of improvements made by him on the estate,[6] but by statute such an heir is enabled to constitute himself a creditor of the estate, or of succeeding heirs of entail, to a certain extent, for certain improvements.

Improvements.

The Montgomery Act, 1770,[7] as amended by the Rutherfurd Act, 1848,[8] and the Entail Cottages Act, 1860,[9] authorises every proprietor of an entailed estate to lay out money in enclosing, planting, draining, erecting farm-houses, etc.,[7] making roads,[8] erecting cottages for labourers and others on the estate,[9] or building a mansion-house or offices, or repairing or adding to them,[10] and empowers an heir of entail to become a creditor of the succeeding heirs of entail for three-fourths (not exceeding four years' free rent of the estates) of the money laid out by him, except where the money is laid out on the mansion-house or offices, when he can only charge the three-fourths against the next heir of entail, and the amount must not exceed two years' free rent.[11]

Montgomery improvements.

1 S. 8.
2 S. 9.
3 *Baird*, 6 D. 643, aff. 6 Bell's App. 7.
4 *Ibid.*
5 10 Geo. III., c. 51, ss. 32–34; 6 & 7 Will. IV., c. 42, ss. 3–6; 1 & 2 Vict., c. 70; 4 & 5 Vict., c. 24; 11 & 12 Vict., c. 36, ss. 5, 37; 16 & 17 Vict., c. 94, s. 11; 31 & 32 Vict., c. 84, ss. 14, 18; 31 & 32 Vict., c. 101, s. 9; 38 & 39 Vict., c. 61, ss. 5, 6, and 12.
6 See Rankine on Land-Ownership, 616, and cases there cited; and see *Dalhousie's Trs.*, 6 R. 141 (improvements authorised by entail).
7 10 Geo. III., c. 51, ss. 9 *et seq.*
8 11 & 12 Vict., c. 36, s. 20.
9 23 & 24 Vict., c. 95; and 31 & 32 Vict., c. 84, s. 12. Such cottages are also a Rutherfurd improvement,—23 & 24 Vict., c. 95, s. 2.
10 10 Geo. III., c. 51, s. 27.
11 Ss. 9–31.

Charging for Montgomery improvements.

The Rutherfurd Act, 1848,[1] made it competent for an heir in possession under an entail to charge the estate during his lifetime for Montgomery improvements by granting a bond of annual rent for the sum for which he had obtained decree under the Montgomery Act, to continue for the life of the granter and a further period of twenty-five years in the case of improvements made before the Act, and for twenty-five years from the date of the decree in the case of improvements made after the Act.

Rutherfurd improvements.

The Rutherfurd Act, 1848, further provides that, where entailed land has been sold under the authority of the Court for the payment of debt, any surplus, if over £200, may be laid out in permanently improving the estate, or in repayment of money already expended in such improvements;[2] and that, where money is derived from the sale of any portion of an entailed estate, or any interest in it, or in respect of any damage to it, under any Act of Parliament, or where money has been invested in trust for the purpose of purchasing lands to be placed under the entail, and where the heir of entail in possession is not entitled to acquire such money in fee-simple, then the heir of entail in possession may, with the authority of the Court, lay out the money as aforesaid.[3] Again, the Entail Amendment Act, 1853, authorises money placed in trust prior to 1st August 1848 to purchase land to be entailed, to be, under the authority of the Court, partly invested in land and partly employed for improvements.[4]

Act of 1853 and improvements.

Entail Amendment Act, 1875, and improvements.

The Entail Amendment Act, 1875,[5] which now applies to old and new entails,[6] authorises the Court[7] to grant to an heir of entail in possession power to borrow money to defray the cost of improvements of the kind specified in the Act, whether *executed by him or in the course of execution, or merely contemplated* at the date of the application. The word "improvements" in the Act includes such improvements as draining; bringing a water supply; embanking; enclosing and reclama-

Improvements in sense of Act of 1875.

[1] Ss. 13–19; and see 45 & 46 Vict., c. 53, s. 4.
[2] Ss. 25, 26.
[3] S. 26, which see.
[4] S. 8.
[5] 38 & 39 Vict., c. 61, s. 7; see *Maclaine*, 5 R. 1053.
[6] See 41 & 42 Vict., c. 28, s. 3; and 45 & 46 Vict., c. 53, s. 4.
[7] Including Sheriff,—45 & 46 Vict., c. 53, s. 5.

tion of land; making of roads, tramways, railways, or canals; trenching, clearing, or planting of land; erecting or improving of the mansion-house[1] or other buildings, including mills with their appurtenances, and jetties.[2]

Entail Act, 1882.

Heir of entail, with authority, may grant bond of annual rent or bond and disposition in security.

Amount of annual rent.

Amount of bond and disposition in security.

Under the Entail Act, 1882,[3] an heir of entail in possession of an entailed estate, who has obtained the authority of the Court to borrow money under the Act of 1875 on the security of the estate, may charge the estate *either* with a bond of annual rent for twenty-five years, at a rate not exceeding £7, 2s. per annum for every £100 borrowed,[4] *or* with a bond and disposition in security for three-fourths[5] of the sum on which the amount of the bond of annual rent, if granted, would be calculated.

Improvement expenditure may be conveyed or bequeathed.

The Act of 1875 provides that, when an heir of entail has died without charging the estate with his improvements, but has bequeathed or assigned them, the transferee can have the estate charged with them in his favour by petitioning the Court to ordain the new heir of entail to grant a bond and disposition in security.[6]

Sale for debts under Rosebery Act;

The Rosebery Act, 1836, allowed an heir in possession of an entailed estate liable "to be adjudged or evicted for the debts or obligations of the maker of the entail," to apply to the Court for power to sell so much of the estate as would produce a sum sufficient to discharge the debts so affecting the estate.[7] The provisions of the Rosebery Act, although not repealed, have been superseded in practice by more recent enactments.[8]

and Rutherfurd Act.

By the Rutherfurd Act, 1848, as amended, it is provided that, (*a*) where it is made competent by that Act for an heir of entail in possession[9] to charge the estate with debt, by granting bonds and dispositions in security therefor[10]; and (*b*) where such charge is made competent by an Act of Parliament, but no power of sale is granted to the heir of entail;[11] and (*c*)

1 See *Fogo*, 5 R. 319.

2 38 & 39 Vict., c. 61, s. 3.

3 S. 6 (1) (4).

4 38 & 39 Vict., c. 61, s. 8; and 41 & 42 Vict., c. 28, s. 3. See *Murray Stewart*, 36 S.L.R. 623 (on right in next heirs to insist on smaller rate).

5 45 & 46 Vict., c. 53, s. 6.

6 S. 11, as amended by 41 & 42 Vict., c. 28.

7 See ss. 7–21.

8 See 11 & 12 Vict., c. 36, ss. 25, 26; 16 & 17 Vict., c. 94, s. 9; 31 & 32 Vict., c. 84, ss. 9, 10.

9 S. 25.

10 See 11 & 12 Vict., c. 36, ss. 18, 21.

11 *Mackenzie*, 11 D. 1115.

where the fee of the estate is validly charged with debt,[1] or may be validly charged with debt,[2]—in these cases an heir of entail in possession may apply to the Court to sell[3] any portion of the estate, other than the mansion-house, offices, and policies, for payment of the debts.[4]

Sale when object is to treat price as surrogate.

The Entail Act, 1882, also contains a code of procedure for the sale of entailed estates, when the object of the sale is that the price or the free proceeds of the sale are to be treated as a surrogate for the estate, and are to remain under the fetters of the entail.[5]

Propulsion not contravention.

It is within the power of an heir of entail in possession to dispone the estate, or, as it is called, "propel the fee," to the heir who, if he survives, must necessarily succeed him.[6]

Applications for disentail, etc., when estate propelled.

The Entail Acts provide that where an estate held under an old entail has been so propelled under reservation of the liferent of the propeller, any application made under the Rutherfurd Act, 1848, and the Entail Amendment Act, 1853, is effectual, whether made in the name of the heir who has propelled the estate, or of the heir to whom it has been propelled.[7] It is thought that these provisions are extended by implication, by the Entail Act, 1882, to the case of the propulsion of new entails.[8]

Sometimes it is agreed that an old entail shall be extinguished on condition that a new entail shall be executed. To avoid any risk of attachment of the estate by the diligence of adjudication, the heir in possession may, with the necessary consents, make a new entail, and, after obtaining the authority of the Court, record it in the Register of Tailzies and feudalise it.[9] In this way the estate is subject to the old entail until it is brought under the fetters of the new deed.

Working minerals.

It has been settled that an heir of entail in possession can

1 S. 11.
2 16 & 17 Vict., c. 94, s. 9; and see s. 5.
3 31 & 32 Vict., c. 84, s. 9.
4 11 & 12 Vict., c. 36, s. 25.
5 Ss 19–28.
6 *Craigie*, 4th Dec. 1817, F.C.; see also *Padwick*, 1 R. 697.
7 See 31 & 32 Vict., c. 84, s. 13; and 16 & 17 Vict., c. 94, s. 22.
8 Ss. 3, 4.
9 See 11 & 12 Vict., c. 36, s. 4, and 45 & 46 Vict., c. 53, s. 4; Bell's Lect. ii. 1052; *Hay Newton*, 5 M. 1056, aff. 8 M. (H.L.) 66 (where bond of annuity testamentary in form held revoked by the substitution of new entail).

work the minerals, and his working of them will not be interdicted because it may exhaust them.[1]

Cutting timber.

In the absence of any stipulation to the contrary, all wood on the estate, if it is ripe for cutting, and if the cutting does not interfere with the amenity of the mansion-house, may be cut down by the heir in possession. The right of cutting wood passes with the estate; and accordingly the executors of an heir of entail are only entitled to the value of the wood cut down prior to his death.[2]

Letting or pulling down of mansion-house.

An heir of entail in possession cannot let the mansion-house for a period beyond his lifetime;[3] and although he may allow it to go to ruins,[4] he cannot pull it down and sell the materials[5] unless he builds a house equally good.[6] If the rebuilding is not completed before his death, the succeeding heir has no action against his estate for damages.[7]

Assignation or attachment of right of heir in possession.

The life interest in the estate of an heir in possession under a strict entail may, at common law, be assigned by him or attached by his creditors. The lands themselves (as opposed to a liferent) should be assigned or attached under the express qualification that the security or the diligence, as the case may be, shall be extinguished *ipso facto* by the death of the heir in possession.[8]

Right to pursue declarator of irritancy.

The right to pursue a declarator of irritancy against an heir of entail has been held personal to the person having the right to raise the action, and not adjudgable by his creditors[9]; and the *spes successionis* of an heir-apparent to an entailed estate cannot be attached by creditors.[10]

[1] See *Muirhead*, 17 D. 875; *Gould*, 2 F. 130; but see Lord Deas in *Muirhead*, 20 D. 592.

[2] *Boyd*, 8 M. 637; *Mackenzie*, 2 S. 775; *Hamilton*, M. 15,408, and other cases referred to in Rankine on Land-Ownership, 625 *et seq.*; and see also *Macqueen*, 1 F. 1069 (circumstances in which *curator bonis* to heir refused power to cut down wood); and *Huntly's Trs.*, 8 R. 50; *Cathcart*, M. 15,399, aff. 1 Pat. 618.

[3] *Cathcart*, *supra*; *Montgomerie*, 22 R. 465 (only house suitable for residence, yet not held mansion-house).

[4] Sandford on Entails, 281.

[5] *Gordon*, Jan. 24, 1811, F.C.

[6] *Moir*, 4 S. 730.

[7] *Earl of Breadalbane*, 4 R. 667

[8] See *Graham*, 7 S. 13; *Grahame*, 9 S. 130, aff. 6 W. & S. 518; and *Nairne*, Feb. 15, 1810, F.C.; *Ferrier*, 13 S. 1121; *Bontine*, 15 S. 711, aff. 1 Rob. 347.

[9] *Wedderburn*, M. 10,426.

[10] *Beaton*, 1 S. 49; and see *Reid*, 20 R. 510, on nature of *spes successionis*.

CHAPTER V

SERVICE OF HEIRS

HEIRS-AT-LAW; HEIRS OF PROVISION; HEIRS OF PROVISION AND TAILZIE; HEIRS OF PROVISION IN TRUST; COMPLETION OF TITLE OF HEIRS (1) BEFORE THE INFEFTMENT ACT, 1845; (2) AFTER THE COMMENCEMENT OF THE INFEFTMENT ACT, 1845, TILL THE COMMENCEMENT OF THE SERVICE OF HEIRS ACT, 1847, AND THE CROWN CHARTERS ACT, 1847; (3) AFTER THE COMMENCEMENT OF THE SERVICE OF HEIRS ACT, 1847, AND THE CROWN CHARTERS ACT, 1847, TILL THE COMMENCEMENT OF THE TITLES TO LAND ACTS OF 1858 AND 1860; (4) AFTER THE COMMENCEMENT OF THE TITLES TO LAND ACTS OF 1858 AND 1860, TILL THE COMMENCEMENT OF THE TITLES TO LAND CONSOLIDATION ACT, 1868; (5) AT THE PRESENT TIME—*i.e.*, UNDER THE TITLES TO LAND CONSOLIDATION ACT, 1868, AND THE CONVEYANCING ACT, 1874; WHO, AS HEIR, ENTITLED TO MAKE UP TITLE; TO WHOM HEIR REQUIRES TO MAKE UP TITLE; PETITIONS UNDER CONVEYANCING ACT, 1884, SECTION 10; CHARTERS OF *NOVODAMUS*.

HEIRS-AT-LAW; HEIRS OF PROVISION; HEIRS OF PROVISION AND TAILZIE; AND HEIRS OF PROVISION IN TRUST.—With reference to the completion of title, heirs may be divided into four classes —(1) heirs-at-law; (2) heirs of provision; (3) heirs of provision and tailzie; and (4) heirs of provision in trust. If a destination in a conveyance is to A, or to A and his heirs, or to A and his heirs whomsoever in fee (not in trust), the heir in heritage of A makes up a title as heir-at-law; but if the destination is to A and a particular series of heirs—*e.g.*, to A and the heirs of his body—the heir called makes up a title as heir of pro-

Heirs-at-law.

vision, or, in the case of an entail, as heir of provision and tailzie. Sometimes conveyances are, *e.g.*, to A in trust, whom failing, to B in trust. If A accepts office, and dies, and B is willing to take up the trust, B does so in the character of heir of provision in trust.[1] When an heir of conquest, as opposed to an heir of line, made up a title before 1874, he did so in that special character. see Walker 1917 SC 246

Heirs of provision; or of provision and tailzie.

Heirs of provision in trust.

Heir of conquest.

Heirs of provision, or of provision and tailzie, or of provision in trust, are said to succeed *provisione hominis*, and heirs-at-law *provisione legis.*

Heirs *provisione hominis* or *provisione legis.*

Before the Conveyancing Act, 1874, the proper character of heirs had to be set forth accurately in decrees of service in their favour, otherwise they were deemed inept.[2] But when precepts or writs of *clare constat* were granted to the right heir, they were valid although the heir's character was not correctly set forth in them.

Effect of error in character in which heir served before 1874.

Error in precept of *clare constat* before 1874.

The reason of these rules was that a party served heir under a particular deed became liable for the burdens imposed on him by that deed, and that it would have been unjust to hold him liable for burdens imposed by a deed which he had not adopted by completing a title under it. Accordingly, service came to be considered an *actus legitimus*, which must be regulated by strict legal rules.[3] Unlike services, precepts or writs of *clare constat* were not deemed *actus legitimi.* They involved no liability beyond the value of the lands contained in them, and were generally granted by subject-superiors on private knowledge. A precept or writ of *clare constat* did not require to set forth the precise character in which the heir of the last investiture was entitled to the lands.[4]

Reason of above rules.

Any basis for the distinction between services which were considered *actus legitimi* on the one hand and precepts or writs of *clare constat* which were not so deemed on the other, so far as the liability of heirs was concerned, was removed by the provision of the Conveyancing Act, 1874, that an heir should not

Removal of reason.

1 Bell's Lect. ii. 1110; and see *Kerr's Tr.*, 15 R. 520.

2 Bell's Lect. ii. 1099.

3 See Bell's Lect. ii. 1100.

4 *Reid*, 2 Ross' L.C. 272; *Durham's Trs.*, M. 15,118, 2 Ross' L.C. 287; *Crichton's Creditors*, M. 15,115, 2 Ross' L.C. 280; *Ogilvy*, Hume, 724.

be liable for the debts of his ancestor beyond the value of the estate to which he succeeded.[1] The Conveyancing Act, 1874, also provides[2] that, notwithstanding any law or practice existing before the Act, it shall be no objection to any (*a*) precept or writ from Chancery,[3] or (*b*) precept or writ of *clare constat*, or (*c*) decree of service, whether general or special, or (*d*) writ of acknowledgment,[4] whether obtained before or after the commencement of the Act, or (*e*) other decree,[5] or (*f*) petition,[6] that the character of the heir is erroneously stated therein, provided such heir is in truth entitled to succeed to the lands.

Error in character in which heir makes up title no objection to precept, etc.

Fee of lands did not vest *ipso jure* before 1874.

The rule before the commencement of the Conveyancing Act, 1874, was that the fee of property not allodial, such as lands, did not transmit *ipso jure* to an heir, whether heir-at-law or heir of provision of the deceased owner of such fee.[7] If such fee was feudalised in the person of the ancestor, his heir had power to obtain a decree of special service or a writ or precept of *clare constat*, and if such fee was held by the deceased on a personal title, the heir had to obtain a decree of general service.[8] Although a decree of general service recorded and extracted, but not followed by infeftment, has always vested a personal title in the heir obtaining it to the lands to which his ancestor had a personal title, yet, until the passing of the Titles to Land Consolidation Act, 1868, a decree of special service did not until infeftment vest anything in the heir who obtained it so far as the lands were concerned.[9] Only since the passing of the Act of 1868 has an extract decree of special service been equivalent to an unrecorded conveyance in favour of the heir obtaining it.[10]

Estates in land vest, since 1874, without service or other procedure.

The Conveyancing Act, 1874, however, entirely altered the old law with regard to vesting of fees of land in an heir. Section 9 of the Act provides that a personal right to every estate in land descendible to heirs shall, without service or other procedure, vest, or be held to have vested, in the heir entitled

1 S. 12.
2 S. 11.
3 *I.e.*, Crown precepts or writs of *clare constat*.
4 See pp. 334, 349, *infra*.
5 *E.g.*, decree under s. 10 of Act of 1874; see p. 286, *infra*.
6 *E.g.*, petition for service, or petition under s. 10 of Act of 1874.
7 Bell's Lect. ii. 1083.
8 See p. 275 *et seq.*, *infra*.
9 *Moreton's Trs.*, 16 D. 1108.
10 S. 46; and see p. 284, *infra*.

to succeed thereto by his survivance of the person to whom he is entitled to succeed, whether such person shall have died before or after the commencement of the Act, provided the heir shall be alive[1] at the date of the commencement of the Act, if such person shall have died before that date. These provisions apply to heirs of provision as well as to heirs-at-law.[2] An heir, on succeeding to an estate, can therefore dispose of it at once, and his creditors can attach it either during his life or after his death. Where an heir of entail had only a personal right, it was held that his widow could not complete her title to a liferent annuity under section 10.[3]

Provisions of 1695, c. 24.

By the Act 1695, c. 24, it was provided that if any man should serve heir, etc., not to his immediate predecessor, but to one more remote, he should be liable for the debts and deeds of the person interjected, to whom he was apparent heir, and who had been in the possession of the lands and estate to which he served for the space of three years, and that in so far as might extend to the value of the said lands and estate, and no further. The statute applies to an infeftment by an heir under precept or writ of *clare constat* as well as under a service.[4] The debts and deeds to which the responsibility under the Act 1695, c. 24, extended were only such as were onerous, including a reasonable provision for a wife or children.[5]

Effect of 1874 Act as to heir's debts.

The Act 1695 has been superseded by the Act of 1874, the effect of which is to make an estate liable for an heir's debts, however short his possession of it may be.[6]

1661, c. 21.

Under the statute 1661, c. 24, however, no right or disposition made by an heir, so far as it may prejudice his ancestor's creditors, is valid unless it is made and granted a full year after the ancestor's death.[7]

(I.) Completion of Title of Heir before Infeftment Act, 1845.

How heir made up titles before 1845 to lands held of the Crown in which his ancestor died infeft and entered.

If an ancestor died *infeft and entered in lands held of the Crown*, his heir, before 1845, made up a title to the lands by

1 See *Main*, 7 R. 688.

2 *M'Adam*, 6 R. 1256; and see *Forbes*, 15 R. 797.

3 *Howard de Walden*, 2 F. 1101.

4 *Brown*, 14 D. 1041.

5 On Act 1695, c. 24, see Bell's Prin. ss. 1929, 1930; 1 Bell's Com. 708.

6 S. 12.

7 See p. 100, *supra*.

(1) Note. (2) Brieve of inquest and execution of brieve. (3) Claim. (4) After evidence, verdict. (5) Retour of special service. (6) Precept from Chancery. (7) Infeftment. To whom brieve directed.

the following procedure:—(1) He lodged with the clerks in Chancery a note applying for a brieve of inquest. (2) He obtained a brieve of inquest, which was executed. (3) After the expiry of the *inducie*, the brieve and the execution thereof, along with a claim[1] on his behalf, were presented in the Court of service. (4) After evidence had been produced in his favour in support of the statements in both the brieve and the claim, he obtained a verdict in his favour. (5) A retour in his favour was prepared by the clerk to the service, and given into Chancery. (6) A precept from Chancery was, in virtue of the retour of the special service, obtained from Chancery for infefting the heir in the subjects specified in the service. The precept was directed to the Sheriff of the county where the lands were situated, or where the lands lay in different counties separate precepts were directed to the respective Sheriffs of these counties; and the precept was declared to be of no avail as a warrant for service after the first term of Whitsunday or Martinmas after its date, because the casualties were calculated only to that term. (7) He took infeftment in virtue of the precept, and such infeftment gave him a feudal title to the lands in which his ancestor died an entered vassal.[2] Sasine had to be given by the Sheriff to whom the precept was directed, or his substitute, and the Sheriff-Clerk of the county could alone act as notary. The instrument of sasine had to be recorded within sixty days of its date. The brieve[3] for a special service was directed to the Sheriff of the county in which the lands were situated; if the lands lay in different counties, the heir could obtain different brieves directed to the respective Sheriffs of the different counties in which the lands were situated, or otherwise, before the statute 1 and 2 Geo. IV., c. 38,[4] came into force, he could get the Court of Session to grant commissions to the macers to the effect of permitting the service to be expede before them as judges in that part. After that Act, which abolished the competency of expeding service before macers, it was competent to expede a special

[1] For heads of claim, see p. 273, note 2.
[2] Bell's Lect. ii. 1084.
[3] Written in Latin.
[4] Court of Session Act, 1821, s. 11.

service either before the Sheriff of the county in which the lands lay or before the Sheriff of Edinburgh, or, when the lands lay in different counties, before either the Sheriff of Edinburgh or the Sheriffs of the different counties.

When ancestor died base infeft in lands held of the Crown.

If an ancestor died *base infeft in lands held of the Crown*, his heir, before 1845, made up a title, *first*, to the mid-superiority fee, and, *second*, to the property fee; and thereafter he, in the *third* place, consolidated the two fees.[1] In making up a title (1) to the mid-superiority fee the heir lodged with the clerks in Chancery a note applying for a brieve of inquest; and (2) he obtained a brieve of inquest for general service from Chancery, which, unlike a brieve for special service, could be directed to any judge ordinary. (3) The brieve was executed in the same way as a brieve for special service. (4) After the expiry of the *inducie*, the brieve and the execution thereof, along with a claim on his behalf, were presented in the Court of service. The claim for a general service contained three heads, viz.—(*a*) that the claimant's ancestor died at the faith and peace of the Sovereign; (*b*) that the claimant was the nearest and lawful heir in general (or otherwise) of his ancestor; and (*c*) that the claimant was of lawful age.[2] Like a claim for special service, a claim for general service concluded with a prayer, and was signed by the claimant, or his specially authorised attorney. (5) After evidence had been led on the heads of the claim, the jury returned a verdict in conformity with the claim. The verdict was signed by the chancellor of the jury, and the judge interponed authority to it. (6) A minute of the proceedings was entered by the clerk of Court in a book kept for that purpose; and thereafter he prepared a retour of general service, which, when lodged in Chancery, completed the service. (7) The retour of service gave the claimant right to use the unexhausted procuratory of resignation in the disposition to his ancestor, and in virtue of this procuratory he obtained a charter of resignation from the

(1) How title made up to fee of mid-superiority.

[1] Bell's Lect. ii. 1092.

[2] The claim for special service contained these heads in addition to the above: (*d*) the valuation of the lands according to both the old and the new extent; (*e*) that the lands were held immediately of the Crown; (*f*) the holding by which the lands were held; and (*g*) that the subjects were in non-entry. See H.R. 815 and p. 283, *infra*.

Crown. (8) In virtue of the precept of sasine contained in this charter of resignation, he took infeftment by expeding and recording an instrument of sasine in the Register of Sasines appropriate to the lands,—which completed the heir's title to the mid-superiority. The heir next proceeded to make up a feudal title to the base fee of property in his ancestor, and this he did (9) by granting, in his character of immediate superior, a precept of sasine, usually called a precept of *clare constat*, in his own favour for infefting himself as heir of his ancestor in the property fee; and (10) by expeding and recording an instrument of sasine in the appropriate register. Being thus infeft separately in the mid-superiority and the property fees, he then consolidated these two fees.[1]

(2) How heir made up title to the property fee.

(3) Consolidation of two fees.

When ancestor had only a personal title to lands held of the Crown.

A proprietor of lands *held of the Crown* might die *with only a personal (or unfeudalised) title* to the lands. The heir of such proprietor had, before 1845, first of all to expede a general service to give him a right to use the unexecuted warrants in his ancestor's favour. Having obtained general service, he was in a position to make up a title by confirmation or resignation.[2]

How heir made up title when ancestor died entered in lands held of subject-superior.

It has now to be shown how an heir made up, before 1845, a title to subjects held of a subject-superior. If an ancestor died *infeft and entered in lands held* of a subject-superior, his heir made up, before 1845, a title to them (1) by obtaining, if the superior insisted on it—which he, however, seldom did—a retour of general service to prove his character as heir; (2) by obtaining from the superior a precept of sasine, called a precept of *clare constat*, in his favour as heir, the precept being directed, prior to the Infeftment Act, 1845, to the superior's bailie in that part; and (3) by expeding an instrument of sasine in virtue of the precept of *clare constat*, and recording it in the appropriate Register of Sasines.

How heir completed a title when ancestor died base infeft in lands held of subject-superior.

If the ancestor died only *base infeft in lands held of a subject-superior*, his heir, before 1845, made up a title in the same way as if his ancestor had been infeft and entered, with this difference, that, instead of getting from the superior a precept of *clare constat*, he got a charter of

[1] On consolidation, see p. 137, *supra*.

[2] Bell's Lect. ii. 1095.

confirmation and precept of *clare constat* combined. The charter of confirmation confirmed the ancestor's base infeftment, and the precept granted warrant for infefting the heir in the lands.[1]

How heir completed a title when ancestor died with a personal title to lands held of subject-superior.

If the ancestor died having only a *personal (or unfeudalised) title*, his heir, before 1845, first obtained a retour of general service in his favour, which gave him a right to use the unexecuted warrants in his ancestor's title, and thereby to make up a title. (This similar to case of Crown)

How heir made up title when his ancestor died infeft in lands held burgage.

An ancestor possessed of burgage lands might die *either* (a) *infeft, or* (b) *with a personal or unfeudalised title to them.* If the ancestor died *infeft* in burgage lands, his heir made up a title to them, before 1845, by this procedure:[2]—(1) He presented a claim in the character of heir to the bailies of the burgh. (2) One of the bailies, accompanied by the heir (or his procurator) and the town-clerk and two witnesses, proceeded to the subjects, the ancestor's infeftment was produced, and the witnesses were examined as to the propinquity of the heir. (3) The bailie, if satisfied by their evidence of the heir's propinquity, served and cognosced him as heir by giving him earth and stone of the ground, and hasp and staple of the door of the dwelling-house, or, in the event of there being more than one, of the principal dwelling-house. (4) The heir thereupon took hold of the hasp and staple of the door, entered the house, and bolted the door. (5) He then came out and took instruments in the hands of the town-clerk as notary public, and called the attention of the witnesses to the fact. (6) The preceding procedure was set forth in an instrument of cognition and sasine prepared by the town-clerk, being a notary, and signed on each page by him and the two witnesses. (7) The instrument of cognition and sasine, which concluded with *the notary's long docquet*, in which he designed himself clerk of the burgh as well as notary public,[3] had to be recorded within sixty days of its date,[4] under pain of nullity.

1 Bell's Lect. ii. 1097; Jur. Styles (3rd ed.), i. 576.

2 Bell's Lect. ii. 1117; Jur. Styles (3rd ed.), i. 592.

3 Jur. Styles (3rd ed.), i. 593.

4 Until 1860; see p. 282, *infra*.

How heir made up a title when his ancestor had a personal title only to lands held burgage.

When the ancestor died having an *unfeudalised* title only to subjects held burgage, the heir had, before 1845, to obtain a general service to take up the unexecuted procuratory of resignation in his ancestor's favour, and, after symbolical delivery, to expede and record, within sixty days of its date, an instrument of resignation and sasine in the appropriate Burgh Register of Sasines.[1]

(II.) Completion of Heir's Title after the Commencement of the Infeftment Act, 1845, till the Commencement of the Service of Heirs Act, 1847, and the Crown Charters Act, 1847.

The provisions of the Infeftment Act of 1845 regarding the form of precepts of sasine apply to the various forms of precepts for infeftment used in the service of heirs. The provisions regarding the manner of infeftment and form of the instrument of sasine are also applicable in the service of heirs.

Precepts from Chancery to be addressed to a notary.

The Act made it imperative that a precept from Chancery should be addressed to any notary, and enacted that a precept from Chancery should be null unless an instrument of sasine thereon was recorded in the appropriate Register of Sasines before the first term of Whitsunday or Martinmas posterior to the date of such precept, without prejudice to the issue of a new precept.[2] These provisions apply only to subjects held feu or blench. All that the Infeftment Act, 1845, enacted with regard to subjects held burgage was that an instrument of sasine and instrument of cognition and sasine relating to them should remain as before the Act, both as to form and recording, with these exceptions: (1) that they should be valid if they were attested by the town-clerk as a notary, without the addition of his docquet, and by the witnesses; and (2) that the delivery of symbols might lawfully be given, either on the ground of the subjects, as before the Act, or within the council chamber of the burgh by delivery of a pen.[3]

Instrument on precept to be recorded before next term of Whitsunday or Martinmas.

Burgage subjects.

[1] Jur. Styles (3rd ed.), i. 595; Bell's Lect. ii. 1118.

[2] S. 6, and as to fees to be paid to Sheriffs see same section.

[3] S. 7.

(III.) Completion of Heir's Title after the Commencement of the Service of Heirs Act, 1847, and of the Crown Charters Act, 1847, till the Commencement of the Titles to Land Acts of 1858 and 1860.

The following are the leading provisions of the Service of Heirs Act, 1847:—(1) The Act abolished brieves of inquest, and substituted therefor petitions for services.[1] (2) The Act directed—(1) that a petition for *general* service should be presented (*a*) to the Sheriff of the county within which the deceased had at the time of his death his ordinary or principal domicile; or (*b*) in the option of the petitioner, to the Sheriff of Chancery;[2] and (*c*) if the deceased had at the time of his death no domicile within Scotland, then to the Sheriff of Chancery only: and (2) that a petition for *special* service should be presented (*a*) to the Sheriff within whose jurisdiction the lands or other heritages were situated; or (*b*) in the option of the petitioner, to the Sheriff of Chancery; and (*c*) in the event of the lands or heritages being situated in different counties, then to the Sheriff of Chancery only.[3] (3) The Act introduced forms of petitions for both general and special services. In any petition for special service *as heir of line or heir-male*, the Act made it competent to the petitioner to pray for general service in the same character;[4] the prayer of the petition was to serve the petitioner as heir in special of the ancestor, and also as heir in general (or heir-male in general) of the ancestor.[4] In every petition under which an heir claimed to be served heir of provision, whether in general or special, the deed or deeds under which he so claimed required to be distinctly specified in the petition.[5] The Act also allowed an heir to present a petition for general service desiring the effect of his service to be limited to certain lands set forth in a specification annexed to the petition.[6] (4) After the petition for service had been published,[7] and a certain time had elapsed,[8] as set forth in the Act, the Sheriff

Brieve abolished, and petition for service introduced.

To whom petition presented.

Petition for special and general service by heir of line or heir-male.

Petition for general service, with specification annexed.

Publication evidence, judgment.

[1] Ss. 1 and 2.
[2] The Sheriff of Chancery was appointed under the authority of the Act; see ss. 3, 29.
[3] S. 3, and see p. 272, *supra*.
[4] S. 24, and schedule (B).
[5] S. 4.
[6] S. 25, and schedule (D).
[7] See s. 7.
[8] S. 10.

to whom the petition was presented was authorised, by himself, or by the provost, or any of the bailies of any city or royal burgh, who were empowered by the statute to act as commissioners without appointment, or by any commissioner whom such Sheriff might appoint, to receive evidence, documentary and parole; and, on considering the evidence, the Sheriff was entitled to pronounce judgment, serving the petitioner in terms of his petition, or dismissing his petition in whole or in part.[1]

Extract decree of service.

(5) The Act also provided that, on the application of the petitioner in whose favour a judgment had been pronounced, the sheriff-clerk should transmit the petition, with the judgment, etc., to the office of the Director of Chancery to be recorded there, and that an extract thereof should be prepared and sent to the sheriff-clerk of the county to be delivered to the petitioner; and declared that the extract of a decree should have the effect of the certified extract of the retour in use before the Act.[2]

Reference to conditions, burdens, etc.

(6) Further, the Act made it unnecessary, in petitions for special service or the decrees following thereon, to insert prohibitory, irritant, and resolutive clauses of entail or real burdens appointed to be inserted in the investiture of the lands, provided that such were referred to in the way prescribed by the Act.[3]

Contents and effect of extract decree of special service.

(7) The Act enacted (1) that, for the purpose of completing the feudal title of the heir served, every decree of special service should contain a precept of sasine;[4] (2) that an extract decree of special service should be equivalent to a disposition in ordinary form, granted by the last infeft proprietor in favour of the heir, and containing an obligation to infeft by two several infeftments and manners of holding (*a me vel de me*);[5] (3) that the heir, in virtue of such extract decree in his favour, should be entitled to take infeftment, in virtue of the precept of sasine therein, by having expede, by any notary public, an instrument of sasine in the form of schedule (C) of the Act; that such infeftment should be an effectual base infeftment (even although the feu-right of the lands contained a prohibition against subinfeudation or alternative holding) prior to confirmation; but

[1] S. 10.
[2] Ss. 12, 13.
[3] Ss. 5, 6, and schedule (B).
[4] S. 21.
[5] *Ibid.*; but see p. 270, *supra*, and p. 284, *infra*.

that if there was such prohibition in the feu-right the superior could compel the heir to take entry, and was entitled to deal otherwise with him as an unentered vassal;[1] (4) that the service should not be transmissible for the purpose of infefting, in manner and to the effect foresaid, the heir or assignee of the person so served;[1] and (5) that a decree of special service was valid although the ancestor died in nonage, etc.[2]

Lands Transference Act, 1847.

The Lands Transference Act, 1847, made all precepts of *clare constat* from subject-superiors effectual as warrants for giving infeftment to the grantees at any time during their lives.[3]

Lands Transference Burgage Act, 1847.

The Lands Transference Burgage Act, 1847, made it competent, in instruments of resignation and sasine, or of cognition and sasine, to import by reference the conditions and provisions, and prohibitory, irritant, and resolutive clauses applying to entailed lands held burgage,[4] and the real burdens affecting burgage lands, whether entailed or not;[5] and where a person had right by general service to an unrecorded conveyance of burgage subjects, he was empowered by the Act to take infeftment by having expede by the town-clerk (being a notary) an instrument of resignation and sasine,[6] and by recording such instrument[7] in the appropriate burgh register at any time during his life.[8] Such instrument did not require to be preceded by symbolical delivery.[9]

Reference to burdens, etc.

Completion of title of person having right by general service to an unrecorded conveyance.

Crown Charters Act, 1847.

The Crown Charters Act, 1847,[10] enacted:—(1) That from and after 1st October 1847 any person who had either (*a*) obtained himself specially served as heir to his deceased ancestor under the old law, or (*b*) obtained a decree of special service, should, on the payment of the duties, be entitled to a precept from Chancery[11] for infefting himself as such heir;[12] and that any person obtaining decree of general service should also be entitled to such a precept.[13] (2) That it should be competent to obtain a charter of confirmation combined in the same deed with a

Precepts from Chancery to heirs holding decree of special or general service.

Charter of confirmation and precept from Chancery combined.

1 S. 21.
2 S. 22.
3 S. 15.
4 S. 3.
5 S. 4. The Act (10 & 11 Vict., c. 48) contained similar provisions as to lands held feu,—see ss. 4, 5.
6 Schedule (D).
7 S. 5.
8 S. 7.
9 S. 5.
10 10 & 11 Vict., c. 51.
11 Schedule B.
12 S. 18, schedule (B).
13 S. 19.

In precepts from Chancery, etc.

precept from Chancery for infefting an heir.[1] (3) That it should be competent, in Crown charters and in precepts from Chancery, to import by reference[2] conditions and provisions, and prohibitory, irritant, and resolutive clauses of entail,[3] or real burdens, etc.,[4] under which the lands were held.

Reference to conditions, etc.

(IV.) Completion of Heir's Title after the Commencement of the Titles to Land Acts of 1858 and 1860 until the Commencement of the Titles to Land Consolidation Act, 1868.

Writs of *clare constat.*

The Titles to Land Act, 1858, first introduced writs of *clare constat*. The Act provided that—(1) Where precepts from Chancery or precepts of *clare constat* were in use to be granted, it should be sufficient to grant a writ of *clare constat*,[5] and to take infeftment thereunder by recording such writ, with a warrant, in the appropriate Register of Sasines. Where the lands were held of the Crown or of the Prince and Steward of Scotland, an heir demanding a writ of *clare constat* had to produce a decree of general or of special service in his favour; and where the lands were held of a subject-superior, such heir had to produce such a decree only in the event of the superior insisting on its production.[6] (2) All precepts from Chancery and precepts and writs of *clare constat* should operate as confirmation of the whole writs necessary to be confirmed in order to complete the investiture of the grantees under them.[7] (3) Where the deceased died upwards of forty years prior to the date of presenting the petition, it should be sufficient, so far as the domicile of the deceased was concerned, for an heir praying for general service to state in his petition, and, if required in the Court of service, to make oath that he was unable to prove at what place the deceased had his ordinary or principal domicile at the time of his death.[8] (4) Where any party should have acquired right by service (or otherwise) to an unrecorded conveyance (not general), it should be competent

Precepts from Chancery and precepts and writs of *clare constat* operate as confirmation of all writs.

Where ancestor died upwards of forty years back, not necessary to prove his domicile in general service.

How party in right by service to an unrecorded conveyance (not general) could make up title.

1 S. 21.
2 Schedule (C).
3 S. 26.
4 S. 27.
5 Schedule (G).
6 S. 11.
7 S. 11.
8 S. 30.

for such party to take infeftment (*a*) by expeding a notarial instrument in the form of schedule (K) of the Act, and by recording the conveyance itself, with a warrant of registration in his favour, along with the notarial instrument; or (*b*) (where it was not desired to record the whole of the conveyance) by expeding and recording a notarial instrument in the form of schedule (B) of the Act;[1] or to take infeftment and entry (if the unrecorded conveyance contained a procuratory or clause of resignation); (*c*) by obtaining a writ of resignation on the unrecorded conveyance, and by recording the conveyance and the writ, with a warrant of registration in his favour.[2]

How party in right by service to general conveyance could make up title.

(5) Where any party should have acquired right by service (or otherwise) to a *general* conveyance, it should be competent for such party to take infeftment by expeding and recording a notarial instrument in the form of schedule (H) of the Act.[3]

Precept of sasine in decree of special service unnecessary.

A decree of special service being a conveyance in the sense of the Act 1858,[4] it was unnecessary to insert, after the commencement of the Act, a precept of sasine in such a decree,[5] and it was competent to take infeftment under such decree, whether it contained a precept of sasine or not, by recording it with a warrant of registration in favour of the holder of it.[6]

Reference in decree of special service to description, etc.

Further, the description of lands[7] or the destination of an entail[8] could be imported by reference into a decree of special service or in petitions therefor.

Titles to Land Act, 1860.

The Titles to Land Act, 1860, made it competent for the heir of any person who died infeft in lands held burgage (*a*) to obtain from the magistrates of the burgh within which said lands were situated a writ of *clare constat* in the form of schedule (D) of the Act, or in his option (*b*) to apply for and obtain decree of special service by the Sheriff of Chancery, or by the Sheriff of the county within which such lands lay, in the same manner in all respects as if such lands were not held burgage, and allowed infeftment under such writ of *clare constat* or under the extract decree of special service to be taken, by recording it,

Writs of *clare constat*.

Special service.

Infeftment thereunder.

[1] S. 14.
[2] S. 9.
[3] S. 12.
[4] S. 36.
[5] S. 5.
[6] S. 1.
[7] S. 15.
[8] S. 17.

Recording instruments of cognition and sasine within lifetime.

with a warrant of registration in favour of the grantee in the form of schedule (A) of the Act.[1] The Act also authorised instruments of cognition and sasine to be recorded at any time within the lifetime of the party in whose favour they were expede.[2] The Act of 1860 allowed descriptions of lands held burgage,[3] and the burdens affecting them,[4] and the destinations in deeds of entail,[5] to be imported by reference into decrees of service; allowed persons in right by service (or otherwise) of an unrecorded conveyance (not general) of land so held to expede and record a notarial instrument in the form of schedule (G) of the Act, and to record the conveyance itself, with a warrant of registration, and the notarial instrument; or to expede and record a notarial instrument in the form of schedule (B); and allowed persons in right by service (or otherwise) of a *general* conveyance of lands to expede and record a notarial instrument in the form of schedule (E).[6]

Reference in decree of special service to descriptions and burdens.

Completion of title of person in right by service of (*a*) unrecorded conveyance, (*b*) general conveyance.

(V.) Completion of Heir's Title at the Present Time—*i.e.*, under the Titles to Land Consolidation Act, 1868, and the Conveyancing Act, 1874.

The Titles to Land Consolidation Act, 1868, repealed the Acts from 1847 to 1860 above mentioned, and re-enacted, with alterations and additions, their provisions. The provisions of the Act of 1868[7] regarding services are to the following effect:—

Petition necessary for service.

(1) A petition is the only competent way of applying for service.[8]

To whom petition presented.

(2) Petitions are presented in the Sheriff Court,[9] the choice of court being determined by rules the same as those laid down by the Service of Heirs Act, 1847.[10]

Petition must be subscribed by petitioner or mandatory.

(3) Every petition for service must be subscribed by the petitioner or by a mandatory specially authorised for the purpose, and must be in the form, or as nearly as may be in the form, of schedule (P) or schedule (Q) annexed to the Act.[11]

[1] S. 7.
[2] S. 13.
[3] S. 34.
[4] S. 31.
[5] S. 11.
[6] Ss. 10, 8.
[7] Ss. 27–58, 163.
[8] S. 27.
[9] S. 28.
[10] S. 28; see p. 277, *supra*.
[11] S. 29.

What petition requires to set forth.

The Act provides that the particulars must be set forth which before 1847 had to be set forth in an heir's claim to be served, except that it is not necessary to state the value of the lands according to either the new or the old extent, or the valued rent thereof, or of whom the lands are held, or by what service or tenure they are held, or in whose hands the same have been since the death of the ancestor, or whether or how long the same have been in non-entry, or that the petitioner is of lawful age, or that the ancestor died at the faith and peace of his Sovereign;[1] but that in setting forth the death of the ancestor there must also be set forth the date at or about which his death took place, and in cases of general service, with the exception noted below,[2] the county or place in which the deceased had at the time of his death his ordinary or principal domicile. In every case in which the petitioner claims to be served heir of provision, or of taillie and provision, whether in general or special, the deed or deeds under which he so claims must be distinctly specified.[3] It is competent in any petition for special service for the petitioner to pray for general service in the same character as that in which he asks special service, and no further notice or publication of the petition for service is necessary than is required by the Act for a petition of special service.[4] It is also lawful to petition for general service with specification annexed.[5]

Petitioner for special service may also petition for general service in same character.

General service with specification annexed.

(4) After publication[6] of the petition and the lapse of the necessary number of days the Sheriff may by himself or by his commissioners receive evidence,[7] and thereafter he pronounces decree.[8] (Burns p. 130)

When and how evidence led under petition.

(5) Any person who may conceive that he has a right to be served preferable to that of a person who has petitioned for

Competing petitions for service.

[1] See p. 273, *supra*.

[2] Under a petition for general service only, it is unnecessary, if the deceased died upwards of ten years prior to the presenting of such petition, to state or prove the county within which the deceased had his ordinary or principal domicile at the time of his death, or that such domicile was furth of Scotland; but it is sufficient (as far as regards domicile) for the heir to state in his petition, and, if required in the Court of service, to make oath that he is unable to prove at what place the deceased had his ordinary or principal domicile at the time of his death,—s. 34.

[3] But see *Moncrieff*, 6 F. 1021.

[4] S. 48.

[5] S. 49, schedule (R), Nos. 1 and 2.

[6] See s. 30; and see 37 & 38 Vict., c. 94, s. 52.

[7] S. 33.

[8] Ss. 32 and 33.

service may also present a petition of service;[1] and the Sheriff may sist procedure[2] in the first petition, or conjoin the petitions, and thereafter proceed to receive evidence on both claims and to pronounce decree.[3]

Recording and extract of decree of service.

(6) On the application of the petitioner in whose favour a decree has been pronounced by the Sheriff, the sheriff-clerk transmits to the office of the Director of Chancery the proceedings. The decree is recorded by the Director of Chancery, and an extract issued by him.[4]

Appeal for jury trial.

(7) In all cases (*a*) in which competing petitions are conjoined, or (*b*) in which any person competently appears to oppose any petition of service, it is competent to any of the parties, before proof is taken by the Sheriff, to appeal to the Court of Session for jury trial.

Decree refusing to serve, or dismissing a petition, or repelling objections, may be reviewed.

(8) In every case in which the Sheriff pronounces a decree (*a*) refusing[5] to serve a petitioner; or (*b*) dismissing his petition; or (*c*) repelling the objection of an opposing party, it is lawful to bring such decree under review of the Court of Session by note of appeal.[6]

Procedure when decree of service is brought under reduction.

(9) When a process of reduction of any decree of service is brought before the Court of Session, that Court can either allow further or additional evidence, or appoint the cause, or special issues therein, to be tried by jury.[7]

(*a*) An extract decree of special service equivalent to a disposition in favour of heir obtaining it, and his heirs and assignees.

(10) (*a*) On being recorded and extracted,[8] every decree of special service is equivalent to a disposition of the lands granted by the person deceased, being last feudally vest and seised in them, to the heir so served, and to his other heirs and successors entitled to succeed under the destination contained in the deceased's investiture thereof, but under the whole conditions and qualifications of such investiture as set forth or referred

[1] See *Mackenzie*, 8 M. 457.

[2] See *Maitland*, 12 R. 899; *M'Adam*, Hume, 249; *Wilson*, 13 D. 636.

[3] S. 35.

[4] Ss. 36, 37, 38. If the decree was pronounced by the Sheriff of Chancery, the Director of Chancery delivers the extract to the petitioner. In other cases he transmits it to the sheriff-clerk of the county in which the petition was presented, to be handed to the petitioner.

[5] See *Fulton*, 22 R. 823.

[6] S. 42.

[7] S. 43. On reduction of services, see *Alexander*, 6 M. (H.L.) 54; and cases in H.R. 846.

[8] Any person can obtain, on payment of prescribed fees, an extract; but a notarial instrument expede on a decree of special service as opposed to the extracted decree is invalid. *Napier's Tr.*, 2 F. 882.

to in such extracted decree, and that whether the deceased were of full age and capacity to grant a disposition or not. (*b*) The heir can use such extracted decree as if it were actually a disposition of the lands, and in particular he is entitled to take infeftment by recording it in the appropriate Register of Sasines, with a warrant of registration thereon on his behalf.[1] (*c*) The heirs and successors and assignees of the heir who is so served, but is uninfeft, may complete a title by using the extracted decree as an unrecorded conveyance. Prior to this provision a decree of special service to an ancestor infeft did not, until infeftment was taken on it, vest anything in the heir.[2]

(*b*) Heir can record extract decree of special service.

(*c*) Heirs or assignees of heirs served in special can use extract decree of special service as an unrecorded conveyance.

(11) Although an heir petitioning for special service in any character may also pray for general service in the same character,[3] yet no decree of special service implies a general service to the deceased in the same character except as to the particular lands therein embraced.[4]

Special service does not imply general service in same character except as to particular lands.

The Titles to Land Consolidation Act, 1868, also contains provisions regarding writs and precepts of *clare constat*, to the following effect:—(1) When an ancestor dies infeft in lands held of the Crown, his heir, having an extract decree of special service or of general service in his favour, can obtain either a Crown writ of *clare constat* or a precept from Chancery for infefting himself.[5] The Crown writ of *clare constat* is in the form of schedule (U), No. 1, and the precept from Chancery is in the form of schedule (U), No. 2, annexed to the Act. Infeftment is taken by recording such writ or precept with a warrant of registration in the appropriate Register of Sasines.[6] Crown writs of *clare constat* or precepts from Chancery are null unless recorded before the first term of Whitsunday or Martinmas after their date,[7] but a new writ or precept may be issued.[8] (2) (*a*) Precepts of *clare constat* from subject-superiors may be in the form of schedule (W), No. 2, annexed to the Act. (*b*) In all cases in which it is competent to grant precepts of *clare constat* (or in which it was competent before

Crown writs of *clare constat* and precepts from Chancery.

Crown writs or precepts of *clare constat* null unless recorded before first term.

Precepts and writs of *clare constat* from subject-superiors.

[1] S. 46.
[2] S. 46; see p. 270.
[3] S. 48.
[4] S. 47.
[5] For the steps for obtaining these writs, see ss. 84 and 85, as amended by s. 57 of the Conveyancing Act, 1874.
[6] Ss. 84 and 85.
[7] S. 86.
[8] S. 86.

1874 to grant precepts of *clare constat* and charters of confirmation combined) it is sufficient to grant a writ of *clare constat* in the form given in schedule (W), No. 1, of the Act. (*c*)

Effect of recording precept or writ.

Infeftment on a precept of *clare constat* (or precept of *clare constat* and charter of confirmation combined) or writ of *clare constat* may be taken by recording it with a warrant of registration in the appropriate Register of Sasines.[1] (*d*)

Subject-superiors bound to grant writ of *clare constat*.

Subject-superiors are bound to grant such writs of *clare constat* if required by the heir entitled to demand them, provided always that the heir, if required, produces a charter or other writ, showing the *tenendas* and *reddendo* of the lands in which his ancestor died infeft, and at the same time pays or tenders to the superior such duties or casualties as he may be entitled to demand.[1] (3)

Writs of *clare constat* in the case of burgage subjects.

It is also competent for the heir of any person who has died infeft in any lands held burgage to obtain from the magistrates of the burgh within which such lands are situated a writ of *clare constat* in the form of schedule (W), No. 3, of the Act.[2] Such writ may be signed by the provost or acting chief magistrate for the time, and by the town-clerk, or, where there are more than one town-clerk, by one of the town-clerks; and may be recorded with a warrant of registration in the appropriate Register of Sasines.[2] (4)

Writ of *clare constat*, etc., from subject-superiors or magistrates of burgh not to fall by death of granter.

All writs and precepts of *clare constat*, not being from the Crown, remain, notwithstanding the death of the granter, in full force as warrants for infeftment during the lifetime of the grantee.[3]

The Conveyancing Act, 1874, prescribes—(1) how an heir to, or disponee of, a proprietor vested only with a personal right in the sense of the Act makes up a title; and provides (2) that a general service is to be equivalent to a general disposition. (*e*)

Completion of title by petition under Conveyancing Act, 1874, s. 10.

Section 10 of the Act of 1874 provides that an heir to, or disponee of, *a proprietor of any lands who was neither infeft nor served, but vested only with a personal right to such lands, by virtue of section* 9 *of the Act*, or any person acquiring right from such heir or disponee, may make up his title by presenting to

To whom petition presented.

the Sheriff of Chancery, or to the Sheriff of the county where

[1] S. 101.
[2] S. 102.
[3] S. 103.

the lands are situated, a petition in the form of schedule E setting forth the name of the proprietor last infeft, a description of the lands, or a valid reference thereto, and the names and, so far as known, the designations of every proprietor having only a personal right therein, who has intervened between the proprietor last infeft and the petitioner, and also setting forth the petitioner's own right to the said lands. When the decree on such petition is recorded in the appropriate Register of Sasines, the petitioner is held to be duly infeft in the lands.

Form of petition.

Effect of decree.

Section 31 of the Act of 1874 makes a general service to a proprietor who died infeft in lands equivalent to a general disposition for the purpose of completing titles, provided that the heir survived the commencement of the Act.

General service now equivalent to a general disposition.

Prior to this, extract decrees of general service were only used to take up unexecuted warrants for infeftment or to instruct an heir's propinquity to his ancestor and enable him to obtain a precept or writ of *clare constat* or a precept from Chancery. After 1874 such extract decrees can be used as midcouples.

A precept or writ of *clare constat* can be granted only to the immediate heir, whether at law or of provision, of the investiture for the time being, and the ancestor must have been infeft.[1]

To whom precept or writ of *clare constat* can be granted.

The following table[2] contains a summary of the salient points in making up a title by an heir to an ancestor at the different dates mentioned in it:—

[1] *Finlay*, M. 14,480; *Landale*, M. 14,469, 2 Ross' L.C. 253.

[2] It should be noticed that, in what is said in the tables under the head of "Ancestor's Title Unfeudalised," it has been assumed that the author of the ancestor was publicly infeft.

I.—WHERE CROWN THE SUPERIOR.

fore
eftment
t, 1845.

1. Ancestor's Infeftment Public.

(1) Retour of special service following on brieve of inquest and verdict of jury.
(2) Precept from Chancery, which was directed to the sheriff of county in which lands were situated, and which was warrant for sasine till Whitsunday or Martinmas next after its date.
(3) After symbolical delivery, instrument of sasine expede by sheriff-clerk, and recorded within sixty days of its date in the General Register of Sasines or the appropriate Particular Register of Sasines.

2. Ancestor's Infeftment Base.

Here the heir had to take up, *first*, mid-superiority remaining in ancestor's author; *second*, property vested in ancestor; and, in the *third* place, he had to unite the two fees. The procedure was:—

First. *Mid-superiority.*

(1) Retour of general service following on brieve of inquest and verdict of jury to take up unexecuted procuratory of resignation in ancestor's title.
(2) Crown charter of resignation on said procuratory.
(3) After symbolical delivery, instrument of sasine expede in virtue of precept of sasine in Crown charter of resignation, and recorded within sixty days of its date.

Second. *Property.*

(1) Precept of *clare constat* by heir as mid-superior in favour of himself as heir in property.
(2) After symbolical delivery, instrument of sasine expede in virtue of precept of sasine in precept of *clare constat*, and recorded within sixty days of its date.

Third. *Consolidation of two Fees.*

(1) Procuratory of resignation *ad remanentiam* by heir in his own favour.
(2) After symbolical delivery, instrument of resignation *ad remanentiam* expede and recorded within sixty days of its date.

3. Ancestor's Title Unfeudalised.

Here the heir could make up a title either by confirmation or by resignation.

1. By Confirmation.

(1) Retour of general service (following on brieve of inquest and verdict of jury), which gave right to all unexecuted warrants.
(2) After symbolical delivery, instrument of sasine (narrating ancestor's title and deducing retour) expede in virtue of precept of sasine in ancestor's disposition, to which heir acquired right in virtue of retour of general service, and recorded within sixty days of its date.
(3) Crown charter of confirmation.

2. By Resignation.

(1) Retour of general service.
(2) Crown charter of resignation proceeding on procuratory of resignation in ancestor's title, to which heir acquired right by retour of general service.
(3) After symbolical delivery, instrument of sasine expede in virtue of precept of sasine in charter of resignation, and recorded within sixty days of its date.

4. Ancestor having personal right under Conveyancing Act, 1874, section 9.

After Lifetitment Act, 1845.

	First. *Mid-superiority.*	Second. *Property.*
(1) Retour of special service following on brieve of inquest and verdict of jury. (2) Precept from Chancery (containing precept of sasine, in form introduced by Act of 1845, directed to any notary public), which was a warrant for sasine till Whitsunday or Martinmas next after its date. (3) Instrument of sasine (in form introduced by Act of 1845) expede in virtue of precept of sasine in precept from Chancery, and recorded in the General Register of Sasines or the appropriate Particular Register of Sasines before the first term of Whitsunday or Martinmas after the date of the precept from Chancery.	(1) Retour of general service following on brieve of inquest and verdict of jury. (2) Crown charter of resignation (containing precept of sasine in form introduced by Act of 1845). (3) Instrument of sasine (in form introduced by Act of 1845) expede in virtue of precept of sasine in Crown charter of resignation, and recorded during life of heir.	(1) Precept of *clare constat* (containing precept of sasine in form introduced by Act of 1845) by heir as mid-superior in favour of himself as heir in property. (2) Instrument of sasine (in form introduced by Act of 1845) expede in virtue of precept of sasine in precept of *clare constat*, and recorded during life of heir.

Third. *Consolidation of two Fees.*

(1) Procuratory of resignation *ad remanentiam* by heir in his own favour.
(2) After symbolical delivery, instrument of resignation *ad remanentium* expede and recorded within sixty days of its date.

1. *By Confirmation.*

(1) Retour of general service.
(2) Instrument of sasine (in the form introduced by Act of 1845) expede in virtue of precept of sasine in ancestor's title, and retour of general service, and recorded during life of heir.
(3) Crown charter of confirmation.

2. *By Resignation.*

(1) Retour of general service.
(2) Crown charter of resignation (containing precept of sasine in form introduced by the Act of 1845) in virtue of procuratory of resignation in ancestor's disposition, to which heir acquired right by virtue of general service.
(3) Instrument of sasine (in form introduced by the Act of 1845) expede in virtue of precept of sasine in charter of resignation, and recorded during life of heir.

I.—WHERE CROWN THE SUPERIOR—*continued.*

1. Ancestor's Infeftment Public.	2. Ancestor's Infeftment Base.	3. Ancestor's Title Unfeudalised.	4. Ancestor having personal right under Conveyancing Act, 1874, Section 9.
1. *Under* 10 & 11 *Victoria*, *c.* 51.	1. *Under* 10 & 11 *Victoria*, *c.* 51.	1. *By Confirmation.*	
(1) Extract decree of service, general or special, following on petition to Sheriff (or extract retour of service, general or special, obtained under law before Acts).	(1) Extract decree of general service, following on petition to Sheriff (or retour of general service obtained under old law).	(1) Extract decree of general service, following on petition to Sheriff (or retour of general service obtained under old law).	
(2) Precept from Chancery, which contained precept of sasine in form introduced by Act of 1845, and which was directed to any notary public, and which was warrant for infeftment till Whitsunday or Martinmas next after its date.	(2) Combined charter of confirmation (which confirmed the lands and sasine in favour of the ancestor) and precept from Chancery in favour of heir.	(2) Instrument of sasine (in the form introduced by the Act of 1845) expede in virtue of precept of sasine in ancestor's title and extract decree (or retour), and recorded during life of heir.	
(3) Instrument of sasine expede in virtue of precept of sasine in precept from Chancery, and recorded before Whitsunday or Martinmas next after date of precept.	(3) Instrument of sasine expede in virtue of precept of sasine in precept from Chancery, and recorded before Whitsunday or Martinmas after its date.	(3) Crown charter of confirmation.	
or,	or,	2. *By Resignation.*	
2. *Under* 10 & 11 *Victoria*, *c.* 47.	2. *Under* 10 & 11 *Victoria*, *c.* 47.	(1) Extract decree of general service, following on petition to Sheriff (or retour of general service obtained under old law).	
(1) Extract decree of special service, which contained a precept of sasine.	(1) Extract decree of special service, which contained a precept of sasine.	(2) Crown charter of resignation, containing precept of sasine in form introduced by the Act of 1845, in virtue of procuratory of resignation in ancestor's disposition, to which heir acquired right by extract decree (or retour) of general service.	
(2) Instrument of sasine expede in virtue of precept of sasine in extract decree, and recorded during life of heir.	(2) Instrument of sasine expede in virtue of precept of sasine, and recorded during life of heir.	(3) Instrument of sasine (in form introduced by Act of 1845) expede in virtue of precept of sasine in charter of resignation, and recorded during life of heir.	
(3) Crown charter of confirmation.	(3) Crown charter of confirmation, which confirmed the ancestor's and the heir's sasines and their warrants, or the lands and the heir's sasine.		

After Titles to Land Act, 1858, till 1874.	1. (1) Extract decree of service, general or special. (2) Crown writ of *clare constat*, recorded, with a warrant of registration, before the first term of Whitsunday or Martinmas next after its date;[1] *or* precept from Chancery, containing a precept of sasine in the form introduced by Act of 1845, which could be recorded, with a warrant of registration, before the first term after its date, or on which an instrument of sasine, in the form introduced by the Act of 1845, could be expede and recorded before said term. or, 2. (1) Extract decree of special service, recorded with a warrant of registration at any time during life of heir. (2) Crown writ (or charter) of confirmation.	1. (1) Extract decree of general service. (2) Crown writ of *clare constat*, recorded, with a warrant of registration, before the first term of Whitsunday or Martinmas after its date;[1] *or* precept from Chancery, containing a precept of sasine in the form introduced by Act of 1845, which could be recorded with a warrant of registration, before the first term after its date, or on which an instrument of sasine could be recorded before said term. or, 2. (1) Extract decree of special service recorded, with a warrant of registration, at any time during life of heir. (2) Crown writ (or charter) of confirmation.	1. *By Confirmation.* (1) Extract decree of general service. (2) Ancestor's disposition, with a warrant of registration thereon in favour of heir, and notarial instrument, recorded during his lifetime; or notarial instrument, recorded during life of heir. (3) Crown writ (or charter) of confirmation. 2. *By Resignation.* (1) Extract decree of general service. (2) Crown charter of resignation, recorded, with a warrant of registration, during life of heir; or ancestor's disposition, with Crown writ of resignation in heir's favour, written on disposition, recorded with warrant of registration during life of heir.	
After Conveyancing Act, 1874.	1. (1) Extract decree of special service (*a*) recorded, with a warrant of registration, in the appropriate division of the General Register of Sasines at any time during life of heir, or (*b*) followed by a notarial instrument in the form of schedule (J) of the Act of 1868 recorded in the appropriate Register of Sasines. or,	Base infeftment abolished by Conveyancing Act, 1874, section 4 (2), infeftment since that date implying entry with the superior.	(1) Extract decree of general service. (2) Notarial instrument (narrating ancestor's unfeudalised title and heir's extract decree) recorded, with a warrant of registration, during life of heir; or ancestor's title, with a warrant of registration in favour of heir, and a short notarial instrument docqueted with reference thereto, both recorded during life of heir.	Extract decree on petition under section 10, recorded, with warrant of registration, during life of holder.

[1] Note that between 1858 and 1868 a *writ* of *clare constat* could be recorded during the life of the grantee; but the Act of 1868 made a writ, like a precept from Chancery, effectual as a warrant only till the next term after its date.

I.—WHERE CROWN THE SUPERIOR—*continued.*

1. Ancestor's Infeftment Public.	2. Ancestor's Infeftment Base.	3. Ancestor's Title Unfeudalised.	4. Ancestor having personal right under Conveyancing Act, 1874, Section 9.
2. (1) Extract decree of general service, which has the effect (since the Conveyancing Act, 1874, section 31) of a general disposition *mortis causa*, by the proprietor last infeft, in favour of the heir. (2) Notarial instrument (narrating ancestor's infeftment and deducing extract decree of general service) recorded, with a warrant of registration, at any time during life of heir. (or, 3. (1) Extract decree of service, general or special. (2) Crown writ of *clare constat*, or precept from Chancery, (*a*) recorded, with a warrant of registration, before the first term of Whitsunday or Martinmas next after its date, or (*b*) followed by a notarial instrument in the form of Schedule (J) of the Act of 1868 recorded in the appropriate Register of Sasines before said term; or precept of sasine in the form introduced by Act of 1845, on which an instrument of sasine in the form introduced by the Act of 1845 can be expede and recorded before said term.			

II.—WHERE SUBJECT THE SUPERIOR.

	1. Ancestor's Infeftment Public.	2. Ancestor's Infeftment Base.	3. Ancestor's Title Unfeudalised.	4. Ancestor having personal right under Conveyancing Act, 1874, Section 9.
Before Infeftment Act, 1845.	(1) Retour of general service, following on brieve of inquest and verdict of jury, if demanded by superior to prove heir's propinquity or right to succeed. (2) Precept of *clare constat* from superior, directed to superior's bailies. (3) After symbolical delivery, instrument of sasine expede by notary public in virtue of precept of sasine in precept of *clare constat*, and recorded (in the General Register of Sasines or in the appropriate Particular Register of Sasines) within sixty days of its date.	(1) Retour of general service, following on brieve of inquest and verdict of jury, if demanded by superior to prove heir's propinquity or right to succeed. (2) Charter of confirmation (which made ancestor's title public) and precept of *clare constat* combined. (3) After symbolical delivery, instrument of sasine expede in virtue of precept of sasine in precept of *clare constat*, and recorded within sixty days of its date.	1. *By Confirmation.* (1) Retour of general service, following on brieve of inquest and verdict of jury, which gave right to all unexecuted warrants. (2) After symbolical delivery, instrument of sasine, narrating ancestor's title and deducing heir's retour, recorded within sixty days of its date. (3) Charter of confirmation from superior. or, 2. *By Resignation.* (1) General service. (2) Charter of resignation from superior, or, if need be, combined charter of confirmation and resignation. (3) After symbolical delivery, instrument of sasine expede in virtue of precept of sasine in charter, and recorded within sixty days of its date.	
After Infeftment Act, 1845.	(1) Retour of general service, if demanded by superior. (2) Precept of *clare constat* from superior, which might contain precept of sasine in the form introduced by the Act of 1845, or in the old form. (3) Instrument of sasine, in the form introduced by the Act of 1845, whether	(1) Retour of general service, if demanded by superior. (2) Charter of confirmation and precept of *clare constat* combined, which might contain precept of sasine in the new or the old form. (3) Instrument of sasine, recorded as set forth in column 1.	1. *By Confirmation.* (1) Retour of general service. (2) Instrument of sasine, in the form introduced by the Act of 1845, whether precept of sasine in ancestor's title in old or new form, expede and recorded within lifetime of heir; or, if the precept of sasine	

Same all thro' is the same as with the Crown

II.—WHERE SUBJECT THE SUPERIOR—*continued.*

1. Ancestor's Infeftment Public.	2. Ancestor's Infeftment Base.	3. Ancestor's Title Unfeudalised.	4. Ancestor having personal right under Conveyancing Act, 1874, Section 9.
precept of sasine was in the new or the old form, expede in virtue of that precept, and recorded within lifetime of heir; or, if the precept of sasine was in the old form, after symbolical delivery, instrument of sasine in old form expede and recorded within sixty days of its date.		was in the old form, after symbolical delivery, instrument of sasine expede and recorded within sixty days of its date. (3) Charter of confirmation from superior. 2. *By Resignation.* (1) Retour of general service. (2) Charter of resignation (containing precept of sasine in form introduced by the Act of 1845 or in older form), in virtue of procuratory of resignation in ancestor's disposition. (3) Instrument of sasine, in form introduced by the Act of 1845, whether precept of sasine in ancestor's title was in new or old form, expede and recorded within lifetime of heir; or, if the precept of sasine was in old form, after symbolical delivery, instrument of sasine expede and recorded within sixty days of its date.	
1. (1) Extract decree of special service (following on petition to Sheriff), which contained a precept of sasine in form introduced by Act of 1845. (2) Instrument of sasine, expede on precept in extract decree and recorded during life of heir. (3) Charter of confirmation from superior. or,	1. (1) Extract decree of special service. (2) Instrument of sasine, expede in virtue of precept of sasine in extract decree and recorded during life of heir. (3) Charter of confirmation of lands and heir's sasine. or,	As above, with this exception, that retour of general service superseded by extract decree of general service.	

After Service of Heirs Act, 1847.

	2. (1) Extract decree of general service (following on petition to Sheriff), if demanded by superior. (2) Precept of *clare constat* from superior, which contained a precept of sasine. (3) Instrument of sasine, expede on precept of sasine in precept of *clare constat* and recorded during life of heir.	2. (1) Extract decree of general service, if required. (2) Charter of confirmation and precept of *clare constat* combined. (3) Instrument of sasine, expede in virtue of precept of sasine in precept of *clare constat* and recorded during life of heir.	
After Titles to Land Act, 1858, till 1874.	1. (1) Extract decree of special service, recorded, with a warrant of registration, at any time during life of heir. (2) Writ (or charter) of confirmation from superior. (or,) 2. (1) Extract decree of general service, if required by superior. (2) Writ (or precept) of *clare constat* from superior, recorded, with a warrant of registration, at any time during life of heir.	1. (1) Extract decree of special service, recorded, with a warrant of registration, at any time during life of heir. (2) Writ (or charter) of confirmation from superior. (or,) 2. (1) Extract decree of general service, if required by superior. (2) Writ (or precept) of *clare constat* from superior, recorded, with a warrant of registration. The writ or precept operated confirmation of all prior unconfirmed deeds.	*By Confirmation.* (1) Extract decree of general service. (2) Ancestor's title, with warrant of registration and notarial instrument docqueted with reference thereto, both recorded at any time during life of heir; or notarial instrument (narrating ancestor's title and deducing extract decree of general service) recorded. (3) Writ (or charter) of confirmation from superior. (or,) 2. *By Resignation.* (1) Extract decree of general service. (2) Ancestor's disposition, along with writ of resignation (specifying service as connecting title), recorded, with a warrant of registration, in favour of heir, at any time during life of heir; or separate charter of resignation in virtue of procuratory or clause of resignation in ancestor's title, recorded, with a warrant of registration, during life of heir.

II.—WHERE SUBJECT THE SUPERIOR—*continued.*

After Conveyancing Act, 1874.

1. Ancestor's Infeftment Public.

1.

(1) Extract decree of special service (*a*) recorded, with a warrant of registration (in the appropriate division of the General Register of Sasines), at any time during life of heir; or (*b*) followed by an instrument of sasine in the form of Schedule (J) of the Act of 1868, recorded in the appropriate Register of Sasines.

or,

2.

(1) Extract decree of general service, which has the effect (since the Conveyancing Act, 1874, section 31) of a general disposition *mortis causa*, by the proprietor last infeft, in favour of the heir.

(2) Notarial instrument narrating ancestor's infeftment and deducing extract decree of general service recorded at any time during life of heir.

or,

3.

(1) Extract decree of general service, if demanded by superior.

(2) Writ (or precept) of *clare constat*, recorded, with a warrant of registration, at any time during life of heir. Instead of recording a writ or precept of *clare constat* (or extract decree of special service) it has been competent, since 1868 to expede and record a notarial instrument, and, as the precept of *clare constat* contains a precept of sasine, it is competent for the heir, instead of recording it or expeding and recording a notarial instrument, to take infeftment by expeding and recording an instrument of sasine.

2. Ancestor's Infeftment Base.

Base infeftment abolished by Conveyancing Act, 1874, section 4 (2), infeftment since that date implying entry with the superior.

3. Ancestor's Title Unfeudalised.

(1) Extract decree of general service.

(2) Notarial instrument, narrating ancestor's unfeudalised title and heir's extract decree, recorded, with a warrant of registration, during life of heir; or ancestor's title, with a warrant of registration in favour of heir, and a short notarial instrument docqueted with reference thereto, both recorded during life of heir.

4. Ancestor having Personal Right under Conveyancing Act, 1874, Section 9.

Extract decree on petition under section 10, recorded, with a warrant of registration during the life of holder.

III.—BURGAGE SUBJECTS.

	1. Ancestor's Title Feudalised.	2. Ancestor's Title Unfeudalised.	3. Ancestor having personal right under Conveyancing Act, 1874, Section 9.
Before 1845, *i.e.*, prior to 8 & 9 Vict., c. 35.	(1) Claim to bailies of the burgh. (2) Symbolical delivery of subjects on lands. (3) Instrument of cognition and sasine, recorded in the burgh register within sixty days of its date.	(1) Retour of general service. (2) Instrument of resignation and sasine by virtue of procuratory of resignation in ancestor's title recorded within sixty days of its date.	
After Infeftment Act of 1845, 8 & 9 Vict., c. 35.	(1) Claim. (2) Symbolical delivery of subjects on lands, or by delivery of pen in council chambers. (3) Instrument of cognition and sasine, recorded in the Burgh Register within sixty days of its date.[1]	As above; but, after 1847, retour of general service superseded by decree of general service, and instrument of resignation and sasine could be recorded during life of heir.	
After Titles to Land Act of 1860 till 1874.	1. As above; but instrument of cognition and sasine could be recorded during life of heir. (or) 2. (1) Writ of *clare constat* (which, prior to Consolidation Act, 1868, was signed by the provost and bailies, or a quorum of them, and thereafter by the provost and town-clerk), recorded, with a warrant of registration, in the Burgh Register at any time during life of heir. (or) 3. (1) Extract decree of special service (following on petition to the Sheriff) recorded, with a warrant of registration, in the Burgh Register during life of heir;	1. (1) Extract decree of general service. (2) Notarial instrument (narrating ancestor's title, and deducing extract decree), recorded in Burgh Register within lifetime of heir; (or) ancestor's title, with a warrant of registration in favour of heir, and a short notarial instrument docqueted with reference to warrant, recorded as above. (or) 2. (1) Extract decree of general service. (2) Instrument of resignation and sasine, recorded in Burgh Register during life of heir.	

[1] The Service of Heirs Act, 1847, made no alteration: s. 26.

III.—BURGAGE SUBJECTS—*continued.*

1. Ancestor's Title Feudalised.	2. Ancestor's Title Unfeudalised.	3. Ancestor having personal right under Conveyancing Act, 1874, Section 9.
1. (1) Extract decree of special service, recorded, with a warrant of registration, in the Burgh Register during life of heir. or, 2. (1) Extract decree of general service under section 31 of Conveyancing Act, 1874. (2) Notarial instrument (narrating ancestor's infeftment and deducing extract decree), recorded, with a warrant of registration, in the Burgh Register. or, 3. (1) Writ or precept of *clare constat* from magistrates, recorded, with a warrant of registration, in the Burgh Register.	(1) Extract decree of general service. (2) Notarial instrument (narrating ancestor's title and deducing extract decree), recorded, with warrant of registration, in the Burgh Register; or ancestor's title, with a warrant of registration in favour of heir, and a short notarial instrument, docqueted with reference to warrant, both recorded in the Burgh Register.	(1) Extract decree on petition under Conveyancing Act, 1874, section 10, recorded, with a warrant of registration, during life of holder.

After Conveyancing Act, 1874.

How person for whom fiduciary fee held makes up title.

Where a destination conferred upon a person a liferent for himself and a fiduciary fee for a class of heirs who could not be determined until the date of his death, the old method of making up a title by an heir on the death of the fiduciary fiar was to treat the fiduciary fee as a proper fee, so far as regards the completion of title; and accordingly the heir made up a title by means of general service when the fiduciary fiar died either uninfeft altogether, or infeft to the extent of the liferent only, and by means of special service or writ or precept of *clare constat* when the fiduciary fiar died infeft in the fee;[1] and this method is still competent.

Former practice.

Case of *Maule*.

The decision in the case of *Maule*,[2] however, settled that a fiduciary fee is needed only till the heir entitled to the fee is ascertained, that the fiduciary fee disappears at that moment, and that the real fee then vests in the heir as a disponee. Accordingly, if the liferenter dies (*a*) uninfeft or (*b*) infeft only to the extent of a liferent, or probably (*c*) infeft to the full extent of the destination, the heir may complete his title by recording either the disposition or a notarial instrument with a warrant of registration in his favour; and these steps were often taken in practice by the heir after 1876 until the decision in the case of *Macdougall* in 1900, which laid down that the person entitled to take up a fee on the death of a fiduciary fiar can do so by service.[3]

Case of *Macdougall*.

To A in liferent and B in fee.

If a destination be in favour of A in liferent[4] and B in fee, and infeftment is taken in terms of the destination, B, on A's death, does not require to make up any further title.[5] If, however, there is a destination to A in liferent, and to B, whom failing, to C, in fee, and infeftment is taken in favour of A, B, and C, the infeftment in favour of C, who is a substitute to B, is inept, and if B dies without evacuating the destination, C requires to make up a title as heir of provision to B; and where a destination to a parent and his son falls to be construed as

1 *Dundas*, 2 S. 145; *Barstow*, 20 D. 612; M'Laren, i. 564; Fraser, ii. 1453; Bell's Lect. ii. 1105.

2 3 R. 831, and see also *Ferguson*, 2 R. 627; *Maxwell*, 15 S. 291, aff. M'L. & Rob. 790; *Fenton Livingstone*, 1 F. 831.

3 *Macdougall*, 3 F. 99.

4 *Lindsay's Children*, M. App. "Fiar," No. 1.

5 See *Cuming*, 3 Ross' L.C. 712; *Baillie*, 3 Ross' L.C. 713; *Dickson*, 3 Ross' L.C. 715.

a destination to the parent, whom failing, to the son, infeftment in favour of the parent and son will be inept as regards the son, who is a mere substitute, and requires to make up a title on his father's death as his heir of provision.[1]

How conditional (or constructive conditional) institutes make up a title.

In the case of *Hutchison*,[2] a proprietor, infeft in lands, disponed them, by *mortis causa* undelivered deed, to the heirs of his body, equally among them, share and share alike, whom failing, to and in favour of A, B, C, and D, his brothers uterine, equally among them, share and share alike. He died without leaving any heirs of his body, and the Court held that A, B, C, and D were conditional institutes, not substitutes, and that they, as disponees, had right to the property so disponed without service or declarator. The late Lord President Inglis at advising said: "It must now be held as settled for all practical purposes, that when by a *mortis causa* undelivered disposition the conveyance is directly to A *nominatim*, whom failing, to B, and A predeceases the granter, B takes as conditional institute, and not as heir either of A or of the granter." He also said: "The Court are of opinion that when one by *mortis causa* conveyance in the ordinary form dispones to the heirs of his body, or the heirs-male of his body, whom failing, to a person named, the person so named (there being no heirs of his body then existing) is conditional institute; and if no heirs of the body of the granter come into existence, or, existing, predecease him, the condition is purified, and the person named is, on the death of the granter, without qualification or condition, disponee, and as such is entitled to use the executory clauses of the disposition for the purpose of feudalising his right as disponee, without service or declarator."

Hutchison.

Completion of title where ancestor's infeftment of doubtful validity.

It sometimes happens that in completing an heir's title it is found difficult, owing to some mistake, to determine whether the ancestor died infeft or had only a personal title. Suppose, for example, B serves in special to his ancestor A, whose title is complete, and records his extract decree in the Register of

[1] See *Edward and Others*, 10 D. 685; *Wilson*, Dec. 14, 1819, F.C.; *Gordon*, Bell's 8vo Cases, 180; *Napier*, M. 15,418, 15,461, aff. 2 Pat. 108.

[2] 11 M. 229; and see *Colquhoun*, 7 S. 200, 5 W. & S. 32, 9 S. 911; *M'Kenzie*, Nov. 24, 1818, F.C.; *Murray*, 11 S. 629; *Fogo*, 4 D. 1063, aff. 2 Bell's App. 195, 2 Ross' L.C. 36; *Carleton's Creditors*, M. 14,366; *Peacock*, 4 S. 742; Bell's Lect. ii. 1106; Menzies, 789.

Sasines. Owing to an error, say in the warrant of registration, a doubt may arise as to whether B's infeftment was valid. C, B's heir, can now—*i.e.*, since 1874—very easily remove the doubt by obtaining as heir to B an extract decree of general service, and thereafter expeding a notarial instrument narrating the extract decree of special service in favour of A, and deducing the extract decree of general service in favour of himself, and recording the instrument with a warrant of registration. C's title, if made up in this way, will be valid whether the doubt regarding B's infeftment is or is not well founded. C in the case supposed can also make up a title by serving himself heir in special and in general of B, and by recording the extract decree of service on the assumption that B's infeftment was valid; and by expeding and recording a notarial instrument narrating the decree of special service in favour of B, and deducing the decree of service so far as it is general in his own favour, on the assumption that B's infeftment was invalid. Further, C may also make up a title by getting and recording a writ or precept of *clare constat* from the superior, which will give him a valid title if B's infeftment was valid, and by serving himself heir in general to B, and expeding and recording a notarial instrument narrating the decree of special service in favour of B, and deducing the extract decree of general service, which will give him a valid title if B's infeftment was invalid. Of these three methods the first is obviously the best.

Case of superior succeeding to vassal, and *vice versa*.

Sometimes a superior succeeds to a vassal, and *vice versa*. If a superior succeeds to a vassal, he can make up a title to the *dominium utile* in any of the ways open to an heir; and, *inter alia*, he, when the vassal died infeft, may grant, if he cares, a writ or precept of *clare constat* in his own favour as heir in the property. When a vassal succeeds to his superior, he makes up a title to the *dominium directum* in any one of the ways open to an heir. The titles to the *dominium directum* and *dominium utile* being completed, the two fees may be consolidated by recording a minute of consolidation with a warrant of registration.

Petitions under Conveyancing Act, 1874, section 10.

Normal case for use of petitions under Act 1874, s. 10.

The normal case for using a petition under section 10 of the Act of 1874 is where a proprietor dies vested with only a personal right to the lands in the sense of section 9 of the Conveyancing Act, 1874. Thus, suppose that A, infeft in lands, dies, and that B, his heir, who survived 1874, took no steps to complete a title. In such a case, C, B's heir, can make up a title by petition under section 10 of the Act of 1874. There seems to be little doubt that, instead of making up a title by means of a petition under section 10 of the Act, C in the case supposed can pass over B, and make up a title to A by service or by writ or precept of *clare constat*.

Not essential in some cases to recognise personal right.

Essential for petition under Act 1874, s. 10.

Before the procedure set forth in section 10 of the Act of 1874 can be used by an heir, it is essential that there should intervene between him and the proprietor last infeft one or more proprietors who had a personal right to the lands. Thus it cannot be used where A, infeft, died in 1870, and B, his heir, took no steps to complete a title, and died before 1874. The heir of B, in such a case, in making up a title to the land, passes over B, in whom nothing vested, on account of his death before 1874, and serves to A, or gets a writ or precept of *clare constat* as heir of A. Nor should the procedure prescribed by section 10 be used where the last intervening heir has both a personal title and a personal right, as, for example, an extract decree of special service or an extract decree under section 10.

When petition should not be used.

When petition must be used.

There are certain cases in which a title can only be made up in the way prescribed by section 10 of the Act of 1874. (1) Thus, suppose that A, infeft in lands, dies; that his heir, B, takes no steps to complete a title to the lands, but dies after 1874, leaving a general trust-disposition and settlement in favour of trustees. B's trustees can, and require to, make up a title by means of a petition under section 10 of the Act of 1874. (2) Again, suppose that A, infeft in land, dies; that his heir, B, after 1868 serves heir in special to A; that C, B's heir, serves heir in general to B; that D, C's heir, takes no steps to complete a title to the lands, but grants a disposition

of them in favour of E, a stranger, and dies after 1874; E must make up a title by adopting the procedure under section 10 of the Act of 1874. (3) Suppose that A died infeft in lands; that B, his heir, served heir in special to him, but died before the passing of the Titles to Land Consolidation Act, 1868, without having taken infeftment on the decree; that C, B's heir, took no steps to complete a title to the lands, and died before 1874; that D, C's heir, took no steps to complete a title to the lands, but died after 1874, leaving a disposition of the lands in favour of E. In this case nothing vested in B, because prior to the passing of the Act of 1868 an unfeudalised decree of special service fell by the death of the heir in whose favour it was granted; nor in C, because he took no steps to complete a title, and died before the commencement of the Conveyancing Act, 1874; but D, having survived 1874, had a personal right to the lands as heir of A, which he assigned to E. E can therefore make up a title by petition under section 10 of the Act of 1874. Section 10 applies to lands, not to an "estate in lands," such as a bond of annuity.[1]

Illustrative of the preceding contents of this chapter the following examples may be given:—

EXAMPLE.	HOW TITLE MADE UP.
1. A, infeft in land, dies. To complete B's, his heir's, title.	1. B can complete his title in any of these ways:— 1. (1) Special service, B to A. (2) Extract decree of special service, with warrant of registration,[2] recorded in the appropriate Register of Sasines. 2. (1) General service, B to A. (2) Notarial instrument (narrating A's infeftment and deducing decree of general service in favour of B), with warrant, recorded.

[1] *Baroness Howard de Walden*, 2 F. 1101.

[2] All deeds recorded in the Register of Sasines must now have warrants of registration. See p. 69, *supra*.

EXAMPLE.	HOW TITLE MADE UP.
	3. (1) Writ or precept of *clare constat* to B (granted by superior of lands), as heir of A, recorded.
2. A, holding an unrecorded conveyance, decree of adjudication, or extract decree of special service, or extract decree under section 10 of the Conveyancing Act, 1874, or any title equivalent in law to a conveyance, dies. To complete B's, his heir's, title.	2. (1) General service, B to A. (2) Notarial instrument (narrating A's unfeudalised title and deducing service B to A), recorded. In this case B may make up a title by recording the unfeudalised title in favour of A, with a warrant in his own favour, along with a short notarial instrument in form of schedule (N) of the Titles to Land Consolidation Act, 1868, the instrument specifying the decree of general service.
3. A, infeft, dies. B, his heir, takes no step to complete a title, but survives 1874. To complete the title of C, the heir of B.	3. (1) Petition, presented by C, under section 10 of the Conveyancing Act, 1874. (2) Extract decree under it, recorded. But, in this case, C may still, as before 1874, pass over B, and serve in special or general to A, or obtain writ (or precept) of *clare constat* as heir of A. See Example 1.[1]
4. A, publicly infeft, dies. B, his heir, expedes a special service, and dies prior to the *passing*[2] (not commencement) of the Titles to Land Consolidation Act, 1868, uninfeft. To complete the title of C, the heir of B.	4. C passes over B, in whom, on account of his death prior to 31st July 1868, nothing vested, and makes up a title as heir of A, as in Example 1. If B had survived the passing of the Act of 1868, C would have made up a title by general service to B, and by expeding and recording a notarial instrument, the instrument narrating the extract decree of special service and deducing the extract decree of general service.

[1] See p. 302, *supra*.

[2] See s. 46 of Act of 1868.

EXAMPLE.	HOW TITLE MADE UP.
5. A, publicly infeft, dies. B, his heir, expedes a general service, and dies before 1874, and uninfeft. To complete the title of C, the heir of B.	5. A feudalised title could not be taken up by a general service prior to 1874. Nothing was, therefore, vested in B. C, passing over B, will make up a title as heir of A, as in Example 1.
6. A, infeft, dies. B, his heir, expedes a general service, and dies after 1st October 1874, uninfeft. To complete the title of C, the heir of B.	6. (1) General service, C to B. (2) Notarial instrument (narrating A's infeftment and deducing extract decree of general service B to A, and extract decree of general service C to B), recorded.
7. A dies infeft in lands of X and of Y. B, his heir, expedes a special service as regards the lands of X, and gets a writ of *clare constat* from the superior (a subject-superior) as regards the lands of Y, and dies after 1868, uninfeft. To complete the title of C, the heir of B.	7. 1. *Lands of X.* (1) General service, C to B. (2) Notarial instrument (narrating extract decree of special service B to A, and deducing extract decree of general service C to B), recorded. 2. *Lands of Y.* If B died prior to 1st October 1874, C passing over B, in whom nothing vested (a writ (or precept) of *clare constat* not followed by infeftment falling by the death of the grantee), will make up a title as heir of A, as in Example 1. But if B survived that date, C may use petition under the Conveyancing Act, 1874, section 10, setting forth, *inter alia*, personal right in B in the sense of section 9 of that Act, and record extract decree under it.
8. A, publicly infeft, dispones to B by disposition containing procuratory of resignation and precept of sasine. B, base infeft, dies in 1868. C, B's heir, expedes general service to him, and gets a charter of resignation on the procuratory	8. The general service, C to B, gave C right to the unexecuted procuratory of resignation in disposition A to B, and the recorded charter of resignation gave C a feudal title to the mid-superiority. The property remained vested in B. There-

EXAMPLE.	HOW TITLE MADE UP.
in disposition A to B, and records it. To complete the title of D, the heir of C, prior to 1st October 1874.	fore D would first make up a title to the mid-superiority by special service and writ of confirmation, or by writ (or precept) of *clare constat*; and then grant himself a writ (or precept) of *clare constat* as heir of B, and record it, which would vest the property fee in him. He would then unite the mid-superiority and property fees by recording procuratory of resignation *ad remanentiam* in his own favour.
9. A, infeft, by *mortis causa* undelivered deed dispones to himself, whom failing, B. To complete B's title on the death of A.	9. A having instituted himself, B is a substitute, and makes up a title thus :— (1) General service as heir of provision to A. (2) Notarial instrument (narrating *mortis causa* disposition and deducing extract decree of general service B to A), recorded.
10. A, infeft, disponed by general disposition *mortis causa* to B, who, uninfeft, disponed in the same way to C, who died uninfeft. Both the *mortis causa* general dispositions contained assignations to writs. To complete the title of D, the heir of C, after 1874.	10. (1) General service D to C. (2) Notarial instrument (narrating A's infeftment and deducing dispositions A to B and B to C and extract decree of general service), recorded. It matters not whether the general dispositions (*a*) were *inter vivos* or *mortis causa*; or (*b*) contained assignations to writs; or (*c*) were granted prior to or after 1st October 1874.[1]
11. A, infeft, dispones by *mortis causa* undelivered deed to the heirs of his body, whom failing, to B and the heirs of his body, whom failing, to C. To complete the title (1) of X, A's son, on A's death; (2) of B, if	11. 1. X, an institute, records the deed or notarial instrument thereon. 2. B, a conditional institute, as above.

[1] See 37 & 38 Vict., c. 94, s. 29.

EXAMPLE.	HOW TITLE MADE UP.
A dies without issue; (3) of Y, B's son, if A dies without issue and B predeceases him; (4) of C, if A dies without issue and B predeceases him without issue; (5) of B, if A is survived by an only child, X, who dies childless and uninfeft; (6) of B, if A is survived by a son, X, who dies childless and infeft; (7) of Y, son of B, if A dies childless, and if B survives him, but dies uninfeft; (8) of C, if A dies childless and predeceased by B, but survived by Y, an only son of B, who dies childless and uninfeft.	3. Y, a conditional institute, as above. 4. C, a conditional institute, as above. 5. B, a substitute, completes a title thus:— (1) General service B to X, as heir of provision. (2) Notarial instrument (narrating disposition by A and deducing extract decree of general service B to X), recorded. 6. B, a substitute, completes a title as heir of provision in one of three modes set forth in Example 1. 7. Y, a substitute, completes a title thus:— (1) General service, Y to B, as heir of provision. (2) Notarial instrument (narrating disposition by A and deducing extract decree of general service Y to B), recorded. 8. C, a substitute, completes a title thus:— (1) General service C to Y, as heir of provision. (2) Notarial instrument (narrating disposition by A and deducing extract decree of general service C to Y), recorded.
12. A, infeft, by delivered deed dispones to B, whom failing, C, whom failing, to himself. To complete the title of (1) B; (2) of C if B dies uninfeft; (3) of C if B dies	12. 1. B, institute, can record deed, or a notarial instrument. 2. C, a substitute, completes a title thus:—

EXAMPLE.	HOW TITLE MADE UP.
infeft; (4) of A if B is predeceased by C, and B dies uninfeft.	(1) General service, C to B, as heir of provision. (2) Notarial instrument (narrating deed by A and deducing extract decree of general service C to B), recorded. 3. C, substitute to B. See three ways stated in Example 1. 4. A, substitute. (1) General service A to B. (2) Notarial instrument (narrating deed by A and deducing extract decree of general service A to B), recorded.
13. A, infeft, dispones to B, who records his disposition in the wrong register. C, the heir of B, finds out the error. A is dead. To complete C's title.	13. B's infeftment is inept. Therefore C completes a title thus:— (1) General service C to B. (2) Notarial instrument (narrating disposition A to B and deducing extract decree of general service C to B), recorded.
14. A, infeft, dispones to B, who records his deed in the wrong register, and dispones to C, who records, not twenty years ago, his deed from B in the proper register. To complete the title of D, the heir of C.	14. B's infeftment being inept, C's infeftment is also bad. Therefore D will complete his title thus:— (1) General service, D to C. (2) Notarial instrument (narrating disposition A to B and deducing disposition B to C, and extract decree of general service D to C), recorded.
15. A, infeft, dies. B, his heir, records a writ of *clare constat* and dies before 1874. C, the heir of B, discovers a fatal intrinsic error in the writ of *clare constat*. To complete C's title.	15. Nothing vested in B on account of error, which, being intrinsic, prescription does not cover. C makes up a title as heir of A, passing over B. See modes under Example 1.
16. A, infeft, dies. B, his heir, expedes special service to him, but dies after 1868, uninfeft. C, the heir of B, takes no step	16. E must resort to petition under Conveyancing Act, 1874, section 10, and record extract decree under it.

EXAMPLE.	HOW TITLE MADE UP.
to make up a title, and dies after 1874, nor does D, the heir of C, but D conveys the subjects to E, a stranger. To complete E's title.	
17. A, holding burgage subjects, feus in 1876 to B, who records his charter in the division of the General Register of Sasines applicable to the county. To complete the title of C, B's heir.	17. B's charter should have been recorded in the Burgh Register of Sasines, and he died therefore with an unfeudalised title. C completes his title thus :— (1) General service C to B. (2) Notarial instrument (narrating feu-charter to B and deducing extract decree of general service C to B), recorded in the Burgh Register.
18. A, infeft, dispones by delivered deed to B in liferent, and his heirs in fee, and there is no intention shown in deed that B's liferent is to be a liferent merely. To complete the title of C, the heir of B.	18. If B died (*a*) uninfeft, or (*b*) infeft to the extent of the liferent— (1) General service C to B. (2) Notarial instrument (narrating deed A to B and deducing extract decree of general service C to B), recorded. If B died (*c*) infeft in full terms of the destination, C would make up a title to B in one of three ways shown in Example 1.
19. A, infeft, dispones by delivered deed to B in liferent allenarly, or only, or merely, or alimentary, and to the heirs of his body in fee. To complete the title of C, the heir of the body of B, on B's death.	19. Here B is only a fiduciary fiar. The heir is the real fiar, and he can complete a title as a disponee, whether B dies (*a*) uninfeft, or (*b*) infeft to the extent of the liferent, or (*c*) infeft to the full extent of the destination, by recording, with warrant on his behalf, the deed or a notarial instrument as if there had been no fiduciary fiar at all.[1]
	1.
20. A, holding an unfeudalised title, dispones by delivered deed in trust to B, whom	20. (1) Notarial instrument (narrating A's title and deducing deed A to B), recorded.

[1] C may also complete his title by service. See p. 299, *supra*.

EXAMPLE.	HOW TITLE MADE UP.
failing, to C. To complete (1) B's title, and (2) C's title, if B dies uninfeft.	2. (1) General service C to B, as heir in provision in trust. (2) Notarial instrument (narrating A's title and deducing disposition A to B, and extract decree of general service C to B), recorded.
21. A, infeft, dies after 1868; B, his heir, obtains an extract decree of special service, but dies without recording it. To complete the title of C, B's heir.	21. (1) General service C to B. (2) Notarial instrument (narrating extract decree of special service, and deducing extract decree of general service), recorded. Instead of recording a notarial instrument merely, C may record the extract decree of special service, with a warrant of registration in his own favour, and a short notarial instrument in the form of schedule (N) of the Act of 1868, the instrument being docqueted with reference to the warrant of registration.
22. A, infeft, dies after 1868; B, A's heir, obtains an extract decree of special service to A; C, B's heir, obtains an extract decree of general service to B; and D, C's heir, obtains an extract decree of general service to C. B, C, and D did not take infeftment. To complete the title of E, the heir of D.	22. (1) General service E to D. (2) Notarial instrument (narrating extract decree of special service in B's favour, and deducing extract decrees of general service in favour of C, D, and E), recorded. Instead of recording a notarial instrument merely, E may record extract decree of special service in favour of B, with a warrant in his own favour, and a short notarial instrument, docqueted with reference to the warrant.
23. A, infeft, dies after 1868, and B expedes a special service to A, but dies without extracting the decree. To complete the title of C, the heir of B.	23. (1) Get extract of the decree of special service in favour of B. (2) General service C to B. (3) Notarial instrument (narrating extract decree of

EXAMPLE.	HOW TITLE MADE UP.
	special service in favour of B, and deducing extract decree of general service in favour of C), recorded; or extract decree of special service, and short notarial instrument, both recorded.[1]
24. A, infeft, dies in 1890; B, his heir, obtains and records a writ of *clare constat*, and then dispones the lands to C by a disposition in ordinary form, which disposition C records. It is found that the writ of *clare constat* was granted by the wrong superior. To validate C's title.	24. If B is alive, B can make up a title by infeftment following on precept or writ of *clare constat* granted by the proper superior, or on an extract decree of special or general service in his favour as heir of A. Infeftment, so taken by B, will validate C's title *accretione*. But, whether B is living or dead, C can, in virtue of the disposition in his favour which carried the personal right which vested in B by his survivance of A, make up a title by presenting a petition under section 10 of the Act of 1874, and by recording the extract decree thereunder. In this case the petition by C will narrate A's infeftment, state that B had a personal right to the lands, deduce the disposition in favour of C, and pray to have it found that C is entitled to procure himself infeft in the lands.
25. A, infeft, dispones in 1890, by delivered disposition in ordinary form, to B, who grants an assignation thereof in the form of schedule (M), No. 1, of the Act of 1868 in favour of C, who (without taking infeftment) grants a disposition of the lands in ordinary form to D. To complete the title of E, the heir of D.	25. (1) General service, E to D. (2) Notarial instrument (narrating disposition to B, and deducing assignation to C, and disposition to D), recorded; or disposition in B's favour, with a warrant of registration in favour of E, and a short notarial instrument docqueted with reference to the warrant, both recorded.

[1] See preceding cases, 21, 22.

EXAMPLE.	HOW TITLE MADE UP.
26. Suppose that D, not noticing that B and C were not infeft in the lands, had recorded the disposition in his favour. To complete the title of E.	26. The same procedure as above will require to be taken, because the recording of the disposition in D's favour was inept. Accordingly D died with an unfeudalised title to the lands.
27. A, infeft, dies. B, his heir, takes no steps to complete a title, and dies in 1890, leaving all "his estate" to trustees. To complete the title of the trustees.	27. In this case the trustees, although general disponees, cannot complete a title to the lands by expeding and recording a notarial instrument, because their author, B, had only a personal right to them; but the trustees can make up a title by (1) Presenting a petition under section 10 of the Act of 1874; and (2) Recording the extract decree thereunder.
28. Suppose that the trustees, in the preceding case, without having taken any steps to complete a title to the lands, dispone the lands in terms of the truster's directions to C, a beneficiary, and that C happened to be the heir-at-law of both A and B. To complete C's title.	28. C can, and ought, to complete a title by (1) Presenting a petition under section 10 of the Act of 1874; and (2) Recording the extract decree thereunder. But—being the heir-at-law of A and B—C, in the case supposed, can competently ignore the personal right in B, and the assignations thereof in favour of the trustees and himself, and make up a title by service A, or precept or writ of *clare constat* to.
29. A dies with a personal right to lands in the sense of section 9 of the Conveyancing Act. B, his heir, presents a petition under section 10 of the Act, and obtains an extract decree thereunder, but takes no infeftment under it. To complete the title of C, the heir of B.	29. (1) General service. (2) Notarial instrument (narrating the extract decree in favour of B and the extract decree of general service in favour of C), recorded. C, instead of recording a notarial instrument merely, can record the extract decree in favour of B, with a warrant of registration in his (C's) favour, and a short notarial

EXAMPLE.	HOW TITLE MADE UP.
	instrument in the form of schedule (N), No. 1, of the Act of 1868, docqueted with reference to the warrant of registration.
30. A, infeft in the lands of X and Y, held of different superiors, dies. B, his heir, obtains a precept of *clare constat* applicable to the lands of X, and thereafter expedes thereon and records an instrument of sasine; and he also obtains a writ of *clare constat* applicable to the lands of Y, which he does not record at all. B dies in 1898. To complete the title of C, the heir of B, to the lands of X and Y.	30. 1. *Lands of X.* B having died infeft in these lands, C can make up the title to them in any of the ways set forth in Example 1. 2. *Lands of Y.* The unrecorded writ of *clare constat* having become ineffectual by B's death, B died having no more than a personal right in the sense of section 9 to the lands of Y. C can make up a title to them, *either* by (1) presenting a petition under section 10 of the Act of 1874, and (2) recording the extract decree thereunder; *or* (ignoring the personal right in B) by means of service or writ or precept of *clare constat* as heir of A.
31. A dies infeft in the lands of X, Y, and Z, situated in different counties and held of different superiors; B, his heir, desires to complete separate titles to X, Y, and Z without the intervention of the superiors, and with as little procedure as may be. To complete B's title.	31. (1) Petition for special service B to A (presented to the Sheriff of Chancery), praying for separate extract decrees applicable to each of the different lands. (2) Recording the extract decrees, each with a warrant of registration in favour of B, in the appropriate divisions of the General Register of Sasines.
32. A, infeft, dispones by delivered disposition in ordinary form to B and C (spouses) in conjunct fee and liferent, for C's liferent use allenarly, and to D in fee. The disposition is recorded with a warrant of registration in full terms of the destination. To complete D's title after the death of B and C.	32. The import of the destination being that B is fiar, that C has a liferent after the death of B, and that D is a mere substitute to B, the infeftment, so far as it bears to be in D's favour, was inept. Accordingly, D requires to make up a title as heir of provision to B, who was infeft, by means of service or writ or precept of *clare constat.* The

EXAMPLE.	HOW TITLE MADE UP.
	inclusion in the warrant of registration of D's name did not affect prejudicially B's infeftment.
33. Suppose that in the preceding case the disposition had been a *mortis causa* undelivered one, and that B predeceased A, but C and D survived A. To complete the title of C and D.	33. D is constructive conditional institute, and the recording of the disposition, with a warrant of registration in favour of C and D, completes C's title to the liferent and D's title to the fee.
34. A, infeft, dispones by *mortis causa* undelivered deed lands described particularly (or by reference in statutory form) to himself, whom failing, to B. To complete B's title on the death of A.	34. A having instituted himself, B is a substitute, and makes up a title as heir of provision by (1) Extract decree of general service B to A. (2) Notarial instrument (narrating the *mortis causa* disposition, and the extract decree of general service), recorded.
35. A, infeft, dispones, by *mortis causa* undelivered deed, lands, particularly described, to himself in liferent, and B in fee. To complete B's title on the death of A.	35. B, an institute to the fee, can complete a title by recording the disposition.
36. A, infeft, dispones by *mortis causa* undelivered deed lands, particularly described, to B in liferent, and, *on B's death*, to C, whom failing, to D. C survives A, but takes no step to complete a title, and dies before B. To complete D's title.	36. C is institute, and the fee vests in him *a morte testatoris*. He by his survivance of A had, in virtue of the disposition, an unfeudalised title to the lands. Accordingly, D makes up a title as heir of provision to C by (1) Extract decree of general service D to C. (2) Notarial instrument (narrating the disposition, and deducing the extract decree of general service), recorded.
37. A, infeft, dispones lands to B, C, and D in equal shares, and they take infeftment by recording the disposition in their favour. To complete the title	37. X can complete a title by service or writ or precept of *clare constat*. If he use special service, the petition will set forth that B died infeft in one-third *pro*

EXAMPLE.	HOW TITLE MADE UP.
of X, B's heir, to X's one-third *pro indiviso* share.	*indiviso* share of the lands, and pray the Sheriff to serve him nearest and lawful heir in special of B in the said one-third share.
38. A buys lands, takes the title thereto in favour of himself and the heirs-male of his body, and dies infeft, leaving a *mortis causa* undelivered deed, by which he dispones the lands, failing heirs of his body, to B. To make up title of C, the eldest son of A, on the assumption that A did not intend to evacuate the special destination unless he died without heirs-male of his body.	38. C is substitute under the first deed, and as heir of provision thereunder he can make up a title in any of the ways set forth in Example 1.
39. Suppose A had died without issue in the preceding case. To make up the title of B.	39. B, as proper conditional institute, can record the *mortis causa* deed.
40. A is the superior of lands of X, feued to B. B died infeft, and A is his heir. To make up title to the *dominium utile* in favour of A and to consolidate the *dominium directum* and *dominium utile*.	40. 1. *Dominium utile.* Writ or precept of *clare constat*, granted by A in his own favour as heir of B, recorded. 2. Consolidation. Minute of consolidation, in form of schedule C of Conveyancing Act, 1874, executed by A, recorded with warrant of registration.

Before closing this chapter, a word may be said on charters of *novodamus*.[1]

When granted.

CHARTERS OF *NOVODAMUS*.—When the original charter to lands is lost or is defective, or when it is agreed by parties to make alterations on the original conditions of the feu, the superior, whether the Crown or a subject, may grant a charter of *novodamus*[2] either to the original vassal, or to his heir, or to a singular successor in the feu. In the narrative of the charter of *novodamus* the cause of granting is set forth, and the

Difference from an original feu-charter.

[1] On tentative title by trust bond and adjudication (now obsolete), see Bell's Lect. ii. 1115.

[2] 37 & 38 Vict., c. 94, s. 4 (1); and see *Scot*, M. 9339; *Bruce*, M. 9342; *Grieve*, M. 3022; *Magistrates of Inverkeithing*, 2 R. 48.

clause of warrandice, at least if the superior simply intervenes for the convenience of the grantee, should be from fact and deed only. In other respects the charter of *novodamus* is like the feu-charter.[1] Commutation of casualties may be effected by a charter of *novodamus*, or by a discharge in the form of schedule F of the Conveyancing Act, 1874, and an allocation of feu-duties may be effected by a charter of *novodamus*, or by a memorandum in the form of schedule D of that Act. Prior to 1st October 1874 a clause of *novodamus* was often inserted in a charter of resignation or a charter of confirmation.

Commutation of casualties and allocation of feu-duties may be effected by charter of *novodamus*.

To complete his title, the grantee of a charter of *novodamus* either records it, or expedes and records a notarial instrument.

Completion of title under charter of *novodamus*.

The Conveyancing Amendment Act, 1887,[2] makes it incompetent to object to the validity of any charter of *novodamus*, whether granted prior to or after the passing of that Act, on account of the lands therein contained not having previously, and in order to the granting thereof, been resigned into the hands of the superior.

Charter not challengeable because lands not resigned into disponer's hands.

[1] Jur. Styles, i. 150

[2] S. 3.

CHAPTER VI

HERITABLE SECURITIES

THE deeds most commonly used for making heritage a security for debt are deeds imposing real burdens; contracts of ground-annual; bonds and dispositions in security, containing both a personal obligation and a disposition of lands in security; and dispositions of lands *ex facie* absolute, qualified by a back-bond.

The following are the chief rules relating to the constitution, etc., of real burdens on land:—(1) The burden must be laid on the lands, and the intention to impose a burden must be expressed in unambiguous terms.[1] (2) The burden must be contained in the deed constituting it.[2] (3) The burden must be of specific amount, and the creditors' names must be specified;[3] but an obligation *ad factum præstandum*, even though it may result in the payment of an unspecified sum of money, can be made a real burden.[4] (4) The lands on which a real burden is created must be identified in the conveyance constituting it. If they are described in the constitutive deed in general terms merely, the notarial instrument following upon it must contain a description, particular or by reference, of them.[5] (5) The burden, including the amount and the creditor's name, must appear on record.[6] (6) The Statute 1696, c. 5, enacts that "any disposition or other rights that shall be granted hereafter for relief or security of debts to be contracted for the future, shall be of no force as to any such debts that shall be

Rules regarding real burdens.

Burden on land.

In constitutive deed.

Of specific amount.

Creditors' names specified.

Lands described.

Appear on record.

1696, c. 5.

[1] See Lord President Inglis in *Magistrates of Arbroath*, 10 M. 630, at p. 635; *Davidson*, 8 R. 990; *Mackenzie*, 3 Ross' L.C. 1, aff. Robertson's App. 607; *Martin*, M. "Personal and Real," App. No. 5, 3 Ross' L.C. 16; *Macintyre*, 2 S. 664; *Allan*, M. 10,265, aff. 2 Pat. 572.

[2] *Allan, supra*; and see *Wyllie*, 8 S. 337.

[3] *Stenhouse*, M. 10,264; *M'Donald*, Hume, 544; *Broughton's Creditors*, M. 10,247; see *Erskine*, 8 D. 863 (where an annuity to children *nominatim* and their issue held as sufficiently specific as to creditors).

[4] *Edmonstone*, 16 R. 1.

[5] *Cowie's Trs.*, 18 R. 706, rev. 20 R. (H.L.) 81.

[6] *Allan, supra*; *M'Donald, supra*.

found to be contracted *after the seisin or infeftment* following on the said disposition or right, but prejudice to the validity of the said disposition and right as to other points as accords." It has been decided (*a*) that the liability of the debtor and his heirs is unaffected by this Act;[1] (*b*) that an express infeftment in security of debt covers only the sum advanced at the *date of the infeftment*, as opposed to the date of the security writ; and (*c*) that an infeftment in security—*i.e.*, bearing *ex facie* to be a security infeftment—given for an indefinite or contingent sum is not effectual against the lands.[2] (7) As the Act of 1696, c. 5, rendered it impossible to use the bond and disposition in security for a cash-credit or a fluctuating or future debt, it has been provided by section 7 of 19 & 20 Vict., c. 91 (renewing a former Act, 54 Geo. III., c. 137, s. 14, which had been repealed) that lands may be disponed in security of cash accounts or credits,[3] "provided always, that the principal and interest which may become due upon such cash accounts or credits shall be limited to a certain definite sum, to be specified in the security, such definite sum not exceeding the amount of the principal sum, and three years' interest thereon at the rate of five pounds per centum," and that the dispositions so granted shall be effectual securities even for sums advanced subsequent to infeftment. (8) An absolute disposition qualified by a back-letter is often used for constituting a security not only for money lent, but also for money to be lent, *e.g.*, for future debts and for obligations *ad facta præstanda*; and in particular it is used for constituting heritable security for fluctuating or contingent debts. An absolute disposition qualified by a back-bond is not struck at by the Act 1696, c. 5;[4] and the provisions of the Act 19 & 20 Vict., c. 91, do not apply to a security constituted by way of absolute disposition. (9) Heritable securities, in the absence of anything to the contrary, such as clauses or deeds

19 & 20 Vict., c. 91, s. 7, as to security for fluctuating debts under, *e.g.*, cash-credits.

Absolute disposition qualified by back-bond.

Heritable securities rank according to date of infeftment.

[1] *Smith*, 9 S. 136; *Bell's Tr.*, 12 R. 85.

[2] *Lowis*, M. 1233; *Dempster*, M. 10,290; *Pickering*, M. 1155, 2 Ross' L.C. 645; *Stein's Creditors*, M. 1158, 1236, M. 14,127, 3 Pat. 345; *Brough's Creditors*, M. 1159; *Bruce*, 13 S. 1011; *Black*, 12 R. 990; *Turner*, Hume, 660.

[3] By section 134 of 31 & 32 Vict., c. 101, the provisions of that Act relative to bonds and dispositions in security are made applicable to all heritable securities; and accordingly cash-credits containing heritable securities can now be in the form, as nearly as may be, of a bond and disposition in security in the statutory form,—see pp. 324 *et seq.*, *infra*.

[4] *Riddel*, M. 1154, 2 Ross' L.C. 721.

assented to by the creditors to the effect that the securities are to rank *pari passu*, or to be postponed to each other in a certain order, rank according to the dates on which infeftment is taken under them.

I. Constitution, Transmission, and Extinction of Real Burdens.

A real burden may be created by constitution or by reservation; *i.e.*, it may be the subject of a direct grant or it may be reserved to the disponer under a disposition. It may be created in favour of one person in a disposition in favour of another.

Infeftment in a real burden.

The creditor's title to a real burden is completed by the infeftment of the disponee.

How heir made up title to real burden before 1874.

A real burden, being a qualification of the real right of another, as opposed to a proper feudal estate, the heir of the creditor before 1874 took up the right thereto by general service;[1] and before that date a real burden was transmitted by an assignation intimated to the debtor. The assignation was usually recorded in the appropriate Register of Sasines for publication, but before 1874 registration, although usual, was not necessary.[2]

How real burden assigned before 1874.

Present law as to assigning, etc., real burdens.

Under section 30 of the Conveyancing Act, 1874, assignees of real burdens complete their titles, not by intimating their assignations, but by recording them; and the representatives of the creditors complete their title to such burdens as if their authors died with a right to bonds and dispositions in security.

Real burden gives a right to poind the ground, but not to raise an action of maills and duties.

The real burden, being a *debitum fundi*, gives the creditor a right to poind the ground or to attach the subjects by adjudication, but it is not a title of possession, and does not therefore authorise an action of maills and duties until it has been followed by adjudication.

II. Contracts of Ground-Annual.

When contract of ground-annual used.

Where lands could not be subfeued by the proprietors, as in the case of lands held burgage before 1874, or of lands held under a valid prohibition against subinfeudation, a proprietor

[1] *Cuthbertson*, M. App. "Service and Confirmation," No. 2.

[2] *Miller*, Hume, 540, 3 Ross' L.C. 29; *Lamont*, 3 Ross' L.C. 35.

desiring to dispose of his land under reservation of an annual payment made use of a contract of ground-annual or a long lease, as opposed to a feu-right. A contract of ground-annual (or a long lease) may still be used where lands are held under prohibitions against subinfeudation, created before the commencement of the Conveyancing Act, 1874. It is, however, often used in practice when there is nothing to prevent the granting of a valid feu-right.

Ground-annual can be constituted by unilateral or bilateral deed.

A ground-annual can be created by a unilateral deed; but a bilateral deed is now more frequently used. By the unilateral deed the lands are disponed under the real burden of the sum payable annually in name of ground-annual, and the ground-annual forms a burden on the disponee's infeftment. The ground-annual in this form, like a real burden for the price or part of the price of lands sold, authorises the creditor to poind the ground, but it does not confer on him an active title of possession until followed by adjudication.[1] In the bilateral form of the deed the seller dispones the lands in consideration of the ground-annual, and the purchaser obliges himself to pay the ground-annual and dispones the ground-annual and the lands in security thereof.

Infeftment under contract of ground-annual.

A bilateral contract of ground-annual is recorded in the appropriate Register of Sasines with two warrants,—one on behalf of the disponer (*i.e.*, the seller), and the other on behalf of the disponee (*i.e.*, the purchaser and granter of the ground-annual).[2] Such infeftment gives the disponer not only a real security for the ground-annual in his favour, and a right to raise a petitory action, or to charge for payment, but also a right to poind the ground,[3] and to raise an action of maills and duties.[4]

How ground-annuals transmitted before 1874 and now.

Before 1874 the right to a ground-annual was transmitted to an assignee by an assignation intimated to the debtor, and the heir of the creditor made up a title thereto by general service; but now, in virtue of section 30 of the Conveyancing Act, 1874, a ground-annual is assigned by an assignation

1 Bell's Lect. ii. 1156.
2 Jur. Styles, i. 109.
3 See *Bell's Trs.*, 23 R. 650 (creditor entitled to found on Bankruptcy Act, 1856, s. 118).
4 See Bell's Lect. ii. 1158; *Somerville*, 1 F. 726.

which requires registration for its completion, and heirs and others can complete titles to a ground-annual as to a bond and disposition in security.

The ordinary real burdens where executors are not excluded are now moveable as to succession;[1] but securities by way of ground-annual, whether redeemable or irredeemable, still remain heritable in every respect.[2]

Ground-annual heritable as to succession.

III. Bonds and Dispositions in Security.

The most common deed for constituting a heritable security at the present time is the bond and disposition in security, which, as it now exists, is not of ancient date. Its forerunners were the wadset, right of annual rent, and the heritable bond.[1]

The history of the bond and disposition in security may be shortly dealt with.

(1) Prior to 1st October 1845.

The usual clauses in a bond and disposition in security relating to heritable subjects before 1845 were:—(1) *Narrative clause.* (2) *Obligation to repay principal with interest and penalty.* (3) *Disposition in security.* (4) *Clause of redemption.* (5) *Clause of sale on failure of payment.* (6) *Clause binding grantee to ratify any sale.* (7) *Obligation to infeft grantee* a me vel de me. (8) *Procuratory of resignation.* (9) *Obligation by granter to enter grantee's heirs, assignees, and singular successors.* (10) *Clause of warrandice.* (11) *Assignation of writs and rents, and warrandice of this assignation and obligation to make writs forthcoming.* (12) *Consent to registration for preservation and execution.* (13) *Precept of sasine.* (14) *Testing clause.*[3] Infeftment was taken in the same way as under a disposition.

Form of bond and disposition in security.

The holding in a bond and disposition in security over feudal subjects was generally *a me vel de me*, but it might be either *de me* or *a me* simply. A creditor in right of such a deed had, if the holding was *a me*, to be not only infeft but also entered with the superior in order to secure himself against the constitution of a preferable right in the person of a sub-

Holding in bond before 1845.

1 See H.R. 916, 941.
2 See 37 & 38 Vict., c. 94, s. 30.
3 See Jur. Styles (4th ed.), i. 609.

sequent creditor. If the holding was *de me* or *a me vel de me*, infeftment was enough to constitute the preference.[1]

Transmission of bonds and dispositions before 1845.

Before 1845 heritable securities were transmitted in the same form as feudal rights of property, *i.e.*, by disposition, usually called a disposition and assignation.

How heir of creditor made up title before 1845.

The heir of a creditor made up a title in the same way as the heir of an ordinary disponee.

Extinction of bonds and dispositions in security before 1845.

The bond and disposition in security was discharged by a discharge and renunciation granted by the creditor and recorded in the appropriate Register of Sasines.

(2) From 1845 till 1847.

Method of transference.

The Heritable Securities Act, 1845, contained these enactments regarding heritable securities *constituted by infeftment*. (1) The right of the creditor might be transferred by recording an assignation in the form given by the Act.[2] (2) Where the assignation of a heritable security was contained in a deed granted for further purposes and objects, or conveying other properties, it was sufficient for the assignee to record a notarial instrument setting forth generally the nature of such deed, and containing at length the part relating to the security.[3] (3) The creditor's heir could complete a title by obtaining a writ of acknowledgment from the person duly infeft, of whom such security was held, and by recording it.[4] (4) An adjudger could record the abbreviate of the adjudication.[5] (5) An heir duly served and retoured, or the general disponee of the creditor in such security, could expede and record a notarial instrument in the form given by the Act.[6] (6) Any heritable security completed by infeftment might be effectually renounced and discharged, in whole or in part, by recording a discharge in the form given by the Act.[7]

Where assignation in deed for further purposes, etc.

Completion of heir's title.

Completion of adjudger's title.

Discharging security.

Precept in heritable security and infeftment after 1845.

The provisions of the Infeftment Act, 1845, relating to the precept of sasine and to infeftment applied to bonds and dispositions in security.

[1] See H.R. 927.
[2] 8 & 9 Vict. c. 31, s. 1, schedule No. 1.
[3] *Ibid.*
[4] S. 2, schedule No. 2.
[5] S. 3.
[6] S. 4, schedule No. 3.
[7] S. 8, schedule No. 4.

(3) From 1847 [1] till the Titles to Land Acts, 1858 and 1860.

The Heritable Securities Act, 1847, provided a form of a bond and disposition in security, and allowed such a writ to be recorded in the appropriate Register of Sasines.

Reference to conditions, etc.

The import of the clauses was declared, and it was made competent to refer to the conditions of the granter's title as set forth in any recorded instrument of sasine forming a part of the granter's investiture in the lands.[2]

Provisions of Acts of 1845 and 1847 made applicable to all heritable securities.

The Heritable Securities Act, 1854, extended so far as applicable the provisions of the Heritable Securities Acts of 1845 and 1847 to all deeds which required to be followed by infeftment in order to constitute a security over lands, or the rents or profits thereof.[3]

Assignations, etc., registerable for preservation, etc.

It was also made competent to insert in assignations, writs of acknowledgment, and notarial instruments, granted in terms of the Acts of 1845 and 1847, or either of them, a clause of registration for preservation;[4] and unregistered assignations were declared to be sufficient warrants for infeftment in favour of the persons having right to them by service or otherwise.[5]

(4) From 1860 till 1868.

The provisions in the Titles to Land Acts of 1858 and 1860 relating to deeds and conveyances generally were applicable, unless the context was repugnant to such a construction, to bonds and dispositions in security.[6] But both Acts contained provisions relating directly to heritable securities. Thus, they allowed persons having right under general conveyances,[7] and trustees in sequestrations and liquidators of joint-stock companies,[8] to complete a title to heritable securities by expeding and recording notarial instruments. Further, they authorised judicial factors holding a warrant from the Court to complete

Completion of title by general disponees.

Judicial factors, etc.

1 10 & 11 Vict., c. 50.
2 Ss. 2, 3, 4.
3 17 & 18 Vict., c. 62, s. 1.
4 S. 2.
5 S. 3.
6 21 & 22 Vict., c. 76, s. 36; and 23 & 24 Vict., c. 143, s. 2.
7 21 & 22 Vict., c. 76, s. 12, and schedule (H); and 23 & 24 Vict., c. 143, s. 8, and schedule (E).
8 21 & 22 Vict., c. 76, s. 22, and schedule (M); and 23 & 24 Vict., c. 143, s. 15, and schedule (I).

a title to heritable securities, to complete such title by recording the warrant in the Register of Sasines.[1]

Repeal of Acts 1845 to 1860.

The Heritable Securities Acts of 1845, 1847, and 1854, and the Titles to Land Acts of 1858 and 1860, were repealed *in toto* by the Titles to Land Consolidation Act, 1868,[2] but their provisions were, with some changes, re-enacted and codified.

(5) After 1868.

Constitution.

The Titles to Land Consolidation Act, 1868, gives the following form for the bond and disposition in security:—[3]

Form of bond and disposition in security.

I, A B [*here name and design the granter*], grant me to have instantly borrowed and received from C D [*here name and design the creditor*] the sum of [*insert the sum*] sterling; which sum I bind myself, and my heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, to repay to the said C D, his executors [*or* his heirs, excluding executors] or assignees whomsoever, at the term of [*here insert the date and place of payment*], with a fifth part more of liquidate penalty in case of failure, and the interest of said principal sum at the rate of per centum per annum from the date hereof to the said term of payment, and half-yearly, termly, and proportionally thereafter during the not-payment of the same, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said interest at the term of next for the interest due preceding that date, and the next term's payment thereof at following, and so forth half-yearly, termly, and proportionally thereafter during the not-payment of the principal sum, with a fifth part more of the interest due at each term of liquidate penalty in case of failure in the punctual payment thereof. And in security of the personal obligation before written, I dispone to and in favour of the said C D and his foresaids, heritably, but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, All and Whole [*here describe or refer as in schedule (E)*[4] *or schedule (G) to the land*] (*a*), and that in real security to the said C D and his foresaids of the whole sums of money above written, principal, interest, and penalties; and I assign the rents, and I assign the writs, and I grant warrandice, and I reserve power of redemption, and I oblige myself for the expenses of assigning and discharging this security; and on default in payment I grant power of sale; and I consent to registration for preservation and execution. In witness whereof, *&c.* [*insert a testing clause in usual form*].

(*a*) If the lands are held under any real burdens, conditions, provisions, or limitations, insert them here or refer to them in or as nearly as the circumstances may require in the form of schedule (D).

The import of an obligation for repayment by the debtor, and his "heirs, executors, and representatives whomsoever, without

1 21 & 22 Vict., c. 76, s. 21; and 23 & 24 Vict., c. 143, s. 38.

2 31 & 32 Vict., c. 101, s. 4, and schedule (A).

3 S. 118, schedule (FF), No. 1.

4 For schedule (E) read schedule O of the Conveyancing Act, 1874.

the necessity of discussing them in their order," is that during life the granter is personally liable for repayment, and that on his death his estate is liable for it,—*i.e.*, the grantee can claim payment from either the granter's heirs *in mobilibus*,[1] or his heirs in heritage,[2] or both,[3] and, the benefit of discussion being renounced, he does not require to discuss the heirs in heritage in the order which, apart from the renunciation, requires to be followed.[4] But in a question *inter haeredes*, debts heritably secured are payable by the heir in heritage of the debtor, and debts not heritably secured are payable by his executors.[5] A creditor in a bond and disposition in security is entitled to proceed for recovery of the debt due to him under it, either by using personal diligence, or by exercising his power of sale, or by using both remedies.[6]

Import of obligation for repayment.

The obligation for repayment may be in favour of either "the grantee, his executors or assignees whomsoever" or "the grantee, his heirs, excluding executors or assignees, whomsoever." The explanation of this alternative is that before the commencement of the Titles to Land Consolidation Act, 1868, heritable securities were heritable as regards succession to the grantees, but after that Act such succession became in the ordinary case, *i.e.*, where executors are not excluded, moveable.[7]

A heritable security, however, is heritable as regards succession to the creditor if conceived expressly in favour of the creditor, and his heirs or assignees or successors, *excluding executors*. An existing security may be rendered heritable by recording in the Register of Sasines a minute excluding executors in the form given by the Act.[8] This minute may be a document apart; or, if it is desired to record the security writ or a deed of or relating to the security, the minute may be written on such writ or deed.

Heritable if executors excluded in bond.

A security may be rendered moveable by removing the exclusion of executors. This may be done either by recording

1 *Carnegie*, M. 3564.
2 *British Linen Company*, 12 D. 949.
3 Bell's Lect. i. 251.
4 For order of liability among heirs, see Bell's Lect. i. 248.
5 See *Duncan*, 10 R. 1042; *Bell's Tr.*, 12 R. 85; *Douglas' Trs.*, 6 M. 223.
6 *M'Whirter*, 14 R. 918; *M'Nab*, 16 R. 610; and see 31 & 32 Vict., c. 101, s. 131.
7 S. 117.
8 S. 117, schedule (DD).

a minute[1] expressly removing the exclusion or by granting a deed conveying the security without repeating the exclusion.

Bonds still heritable as to (*a*) fisc; (*b*) rights of husband and wife; (*c*) children's right to legitim.

Heritable securities remain heritable *quoad fiscum*, and as regards all rights of courtesy and terce competent to the husband or wife of the creditor, and heritable securities, whether granted before or after marriage, do not fall under a husband's *jus mariti*,[2] a wife's *jus relictæ*, or children's right to legitim. These provisions apply to testate succession as well as to intestate.[3]

Rights of Debtor and Creditor in relation to each other.

Position of debtor in bond.

The debtor under a bond and disposition in security can alienate the security subjects under burden of the bond; and whilst he remains in possession of the subjects he can perform all ordinary acts of administration. For example, he can grant leases of ordinary duration for a fair rent. But the creditor's security cannot be prejudiced by contracts outside the ordinary powers of management, into which the debtor enters without his consent. Such contracts on the debtor's part are neither binding on, nor enforceable by, the creditor.[4]

Creditor cannot prejudice debtor.

Similarly, the creditor cannot prejudice the debtor's position. Thus where a debtor sells his lands under burden of a bond and disposition in security, and is thereafter called on to make payment of the sum in the bond, he may demand, as a condition of payment, an assignation to the bond to enable him to operate relief against the purchaser of the lands; and, if the creditor is unable to assign the bond in its entirety—in consequence, for example, of his having released a part of the security subjects in favour of the purchaser, or of his having consented to a feu of part of them, and released the *dominium utile* of the part so feued—the creditor has no right to recover from the debtor the debt, in whole or in part.[5] The principle of these decisions is,

[1] S. 117, schedule (EE).

[2] See *Hodge*, 7 R. 259 (where heritable security to which wife succeeded in 1871 did not fall under *jus mariti*).

[3] *Hughes' Trs.*, 18 R. 299; *Gilligan*, 18 R. 387; and see *Hare*, 17 R. 105.

[4] *Heron*, 20 R. 1001; *Morier*, 23 R. 67; *Smith*, 23 R. 60.

[5] *North Albion Property Investment Co.*, 21 R. 90; *Mackirdy*, 22 R. 340.

that a creditor demanding repayment from a debtor must be in a position to reinstate the debtor in the position in which he was when the bond was granted.

Assignation of rents. Insurance. Possession. Repairs.

The assignation of rents in a bond and disposition in security includes a power to the creditor (*a*) to insure all buildings against loss by fire, and, *in default of payment*, (*b*) to enter into possession of the lands, and uplift the rents, subject to accounting to the debtor for any balance of rents actually recovered beyond what is necessary for payment of principal, interest, penalty, and expenses; and (*c*) to make all necessary repairs on the buildings.

Creditors' powers.

The means which the creditor under a bond and disposition in security may use to recover the amount of the debt and interest are these:—

(1) Entering into possession.

(1) Entering into possession of the lands, where the debtor is in natural possession of them, either (*a*) by consent of the debtor, or, if he does not consent, (*b*) by means of a summary process of ejection under the Heritable Securities Act, 1894,[1] s. 5. Prior to 1894 the method was an action of declarator of removing.[2]

(2) Maills and duties.

(2) Entering into possession, where the debtor is not in the natural possession of the subjects, by an action of maills and duties. This action had formerly to be directed against all the tenants.[3] Under the Heritable Securities Act, 1894, which provides a form for the summons,[4] it may be directed against the landlord alone. Notice of the raising of the action given to the tenants by registered letter in a prescribed form[5] interpels them from paying their rents to the debtor; and intimation of the decree made to them by registered letter, in the form prescribed by the Act,[6] renders them liable to pay their rents to the creditor, such payment being a complete discharge and exoneration to the tenants.

Powers of creditors in possession as to rents, repairs, etc.

The Titles to Land Consolidation Act, 1868,[7] gives a creditor in possession power not only to uplift the rents, but also to

1 57 & 58 Vict., c. 44.
2 *Wilson*, 1 S. 316; *Blair*, 16 D. 291; Bell's Lect. ii. 1169.
3 *Haliburton*, M. 2232; *Mudie*, M. 2229.
4 Schedule (A).
5 Schedule (B).
6 Schedule (C).
7 S. 119.

make all necessary repairs on the buildings, and to deduct in an accounting with the debtor the expenses of management, insurance,[1] and repairs.

What leases creditor can grant.

A creditor in possession of security subjects may let them on lease for a period not exceeding seven years in duration, and may apply to the Sheriff for warrant to let them for a period exceeding seven years but not exceeding twenty-one years for heritable property in general and thirty-one years for minerals.[2]

Liabilities of creditor in possession.

A creditor in possession, as an intromitter with the rents, is liable for feu-duties,[3] and rates, and assessments,[4] and a creditor who enters into possession, and acts as owner of the security subjects to the exclusion of the real owner, is liable as if he were proprietor in questions with the public.[5]

How creditor in possession may deal with surplus rents.

After paying feu-duty, and rates, and assessments, and the expenses of management, insurance, and repairs, a creditor in possession may, in a question with the debtor, apply the balance of rents to the payment of interest and principal due, or he may, after satisfying the interest due to him, hand over the balance to the debtor.[6] But where there are postponed bondholders, the creditor in possession is not entitled, after intimation to him of the assignation of rents in their favour, to make payment of any surplus of rents to the debtor which may remain after satisfying his interest. In such a case he must apply such surplus in extinction of the principal sum due to him, and if that is satisfied, he must account for the surplus to the postponed bondholders.[7]

(3) Poinding the ground.

(3) Poinding the ground, whether the creditor has entered into possession or not. By poinding the ground the creditor can attach the moveables on the ground belonging either to the proprietor or (but only to the extent of their rents past due and unpaid) to the tenants.

[1] On right of heritable creditors holding policies of insurance over the security subjects, see *Scottish Amicable Heritable Securities Association*, 11 R. 287; *Glasgow Provident Investment Society*, 14 R. 947, aff. 15 R. (H.L.) 89.

[2] Heritable Securities Act, 1894, ss. 6, 7.

[3] *Liquidators of City of Glasgow Bank*, 9 R. 689.

[4] See *Greenock Police Board*, 12 R. 832; *Liquidators of City of Glasgow Bank, supra*; *North British Property Investment Company*, 15 R. 885.

[5] *Baillie*, 21 R. 498.

[6] See *Brown*, 13 S. 256.

[7] See *Brown supra*; *Pollock*, 21 D. 1210.

(4) Adjudication. This may proceed on the personal obligation in the bond, in which case it may cover the debtor's whole heritable estate; or it may be based on the *debitum fundi* created by the disposition in security, in which case it must follow a decree of poinding of the ground, and will attach only the security subjects.[1] (4) Adjudication.

(5) Inhibition.[2] (5) Inhibition.

(6) Summary diligence upon six days' charge where there is a consent to registration in the statutory form.[3] (6) Summary diligence.

(7) Sale of security subjects. Before a sale can be carried through by a creditor under a bond and disposition in security in its modern form, he must (1) give three months' intimation to the debtor and to the proprietor for the time being of the property that he requires repayment; (2) advertise, after the three months have expired, the subjects for sale for six weeks; and thereafter (3) sell by public roup, subject to the obligation to account to the debtor for the price, after deduction of principal and interest and penalties.[3] (7) Sale of security subjects. (1) Intimation. (2) Advertisement. (3) Sale by public roup.

Upon a sale being carried through in terms of the Act, and upon consignation in bank of the surplus of the price, after deducting the debt secured, with interest and penalties, and expenses in reference to the possession of the estate, if such creditor has been in possession, and whole expenses attending the sale, and after paying all previous incumbrances, and the expense of discharging the same, the disposition by the creditor to the purchaser has the effect of completely disencumbering the lands and others sold of the selling creditor's security and all securities posterior to it.[4] On sale and consignation of surplus, lands disencumbered of securities of seller and of posterior creditors.

Where no surplus remains, a certificate of no surplus executed by a notary public, recorded along with the disposition by the creditor to the purchaser, has the effect of disencumbering the lands.[5] Disencumbering lands when no surplus for debtor.

Completion of Title by Creditor under Bond and Disposition in Security.—A creditor in a bond and disposition in security or other heritable security, the granter of which has When granter infeft.

[1] Ersk. ii. 8, 37; 1 Bell's Com. 753.
[2] 2 Bell's Com. 134.
[3] 31 & 32 Vict., c. 101, ss. 119, 138, 122.
[4] *Ibid.* s. 123.
[5] 37 & 38 Vict., c. 94, s. 48, schedule (L), No. 1.

Recording of bond by grantee.

a feudal title, completes his title by recording the deed, with a warrant of registration, in the appropriate Register of Sasines at any time during his lifetime, and heritable securities are in competition preferable according to the date of their registration.[1]

Notarial instrument.

A bond may be embodied in a deed for further purposes, as, *e.g.*, in a marriage-contract, but whether it is contained in such a deed or not, the creditor may, instead of recording the bond or the full deed embodying the bond, record a notarial instrument in the form of schedule (J) of the Titles to Land Consolidation Act, 1868.[2] Further, a deed embodying a bond

Clause of direction.

may contain a clause of direction,[3] in which case the creditor may complete a title either by recording the whole of the deed or only that part of it to which the clause of direction applies, or by expeding and recording a notarial instrument.[4]

Assignation of recorded bond.

Transmission or Assignation of Bonds and Dispositions in Security.—Where a heritable security has been constituted by infeftment, the right of the creditor therein may be transferred, in whole or in part, by an assignation in the form provided by the Titles to Land Consolidation Act, 1868.[5]

Completion of assignee's title.

The recording of the assignation in the appropriate Register of Sasines completes the assignee's title.[6] Where the assignation is contained in any other conveyance or deed, it is not necessary to record the whole of such conveyance or deed, but it is sufficient to expede and record in the appropriate Register of Sasines a notarial instrument in a form given by the Act.[7]

Assignation of unrecorded bond.

The Titles to Land Consolidation Act, 1868, is silent as to how an unrecorded heritable security can be assigned. It, however, does not seem open to doubt that an unrecorded heritable security may be effectually assigned in any of the ways by which it is competent to assign an unrecorded disposition, infeftment being taken also in a similar manner. If

Assignee's infeftment.

an unrecorded bond and disposition in security be assigned in the form of schedule (GG) of the Act of 1868, the assignee may, it is thought, take infeftment under the bond either by expeding

1 31 & 32 Vict., c. 101, s. 120.
2 *Ibid.* s. 17.
3 See p. 68, *supra*.
4 See p. 68, *supra*.
5 S. 124, schedule (GG).
6 S. 124.
7 S. 124, schedule (HH).

and recording a notarial instrument or by recording the bond and disposition in security along with a notarial instrument.[1]

Bond assignable by general disposition.

A heritable security can be assigned by general disposition, and a general disponee can complete his title to the bond in the manner hereinafter set forth.[2]

Restriction of bond.

How Bonds and Dispositions are Restricted, Postponed, or Ranked *pari passu*.—Any heritable security constituted by infeftment may be restricted to a portion of the security subjects, the remainder being released by a deed of restriction in a form provided by the Act of 1868, recorded in the appropriate Register of Sasines.[3]

Postponement of bond.

A bond and disposition in security may be postponed to or ranked *pari passu* with a later bond. The postponement or the ranking *pari passu* may be effected either by a clause in the new bond or by a separate deed.[4] The bond or the separate deed is signed by the creditor who assents to the agreement.

Discharge of recorded bond.

How Bonds and Dispositions may be Renounced and Discharged.—(1) Express Discharge.—By section 132 of the Titles to Land Consolidation Act, 1868, any heritable security, constituted by infeftment, may be discharged by a discharge in the form given by the Act and registered in the appropriate Register of Sasines.[5]

Registration of discharge.

Notarial instrument.

When it is not desired to record the whole discharge, a notarial instrument may be recorded.[6] In any discharge the lands may be described by reference.[7]

Extinction of bonds otherwise than by express discharge.

Other Methods of Discharge.—A bond and disposition may be discharged otherwise than by express discharge, the heritable security being a mere accessory of the debt. Thus it may be extinguished—

Payment.

(2) By Payment.[8]—Partial payment discharges the debt *pro tanto*, the security remaining good for the balance.

Import of clause of redemption.

Where the granter of a heritable security containing a clause of redemption in the statutory form desires to exercise

1 See p. 148, *supra*.
2 See p. 333, *infra*.
3 S. 133, schedule (OO).
4 For examples of bond with clause of postponement, see Jur. Styles, vol. i. 250.
5 S. 132, schedule (NN).
6 S. 17, schedule (J).
7 S. 3 (7), and 37 & 38 Vict., c. 94, s. 61, schedule (O).
8 Bell's Lect. ii. 1135.

this right, he must give premonition of three months to the grantee personally or at his dwelling-place if within Scotland, and if not, then at the office of the keeper of the record of edictal citations, in presence of a notary public and witnesses, of his intention to pay the sums due. If the creditor is absent or refuses to receive payment, the debtor may consign the amount in the bank specified in the security, or if no bank is so specified, in one or other of the banks in Scotland incorporated by Act of Parliament or Royal Charter, having an office or branch at the place of payment.[1] Where the debtor has exercised his right of redemption, but cannot obtain a discharge, he may consign the amount, principal and interest, due, and thereafter record in the appropriate Register of Sasines a certificate expede by a notary public in a form given by the Conveyancing Act, 1874, and such recording has the effect of disencumbering the lands.[2]

Discharge of bonds where discharge cannot be obtained from creditor.

Compensation.

(3) COMPENSATION.—A bond may be extinguished by compensation in whole or in part—in whole when the bondholder becomes indebted to the debtor in an amount equal to or greater than the sum due under the bond, and in part when the bondholder becomes indebted to the debtor in a smaller sum than that due under the bond. Compensation to extinguish a debt must be pleaded. It does not operate *ipso facto*.[3]

Confusion.

(4) BY CONFUSION.—When the same person becomes both creditor and debtor in the same obligation, as *e.g.*, where the debtor succeeds to the creditor, or where the creditor succeeds to the debtor, or where a stranger succeeds to both, the obligation is either extinguished *confusione* or suspended.[4] Where the creditor has an interest to keep up the debt, it may be only suspended and not extinguished. Thus a liar of an estate subject to a liferent may take an assignation to a bond over the estate and keep it up as a subsisting obligation,[5] and if an heir of entail pays off a burden affecting the entailed estate, he is entitled to take an assignation to the debt and thereafter assign the bond to a third party.[6]

[1] 31 & 32 Vict., c. 101, s. 119.
[2] 37 & 38 Vict., c. 94, s. 49; schedule (L), No. 2.
[3] 1592, c. 143.
[4] *Hogg*, 11 S. 198; *Murray*, 18 R. 287.
[5] *Fraser*, 2 R. 595.
[6] *Welsh*, 15 S. 537; *Macalister*, 4 M. 245; *Crawford*, March 11, 1809, F.C.; *Lawrie*, 9 S. 147; and see *Duke of Roxburghe*, 1 W. & S. 41; *Mackenzie*, 16 S. 311, aff. M'L. & Rob. 117.

(5) By Intromissions with Rents.—When a creditor enters into possession and ingathers the rents, the debt and security will to the extent of his intromissions be extinguished even in a question with an assignee of the security.[1] Intromissions with rents.

When lands disponed under the authority of an Act of Parliament, in excambion for other lands, are burdened with debts, registration in the appropriate Register of Sasines of the deed of excambion transfers the debt to the lands received. In the case of excambions after 1868, such intimation as the Court of Session may consider necessary has to be made to all creditors having interest, and such creditors are entitled to state any objections to the excambion.[2] Debts can be transferred from one estate to another when entailed lands are excambed.

How Executors, Heirs, Legatees, and General Disponees make up Titles to Bonds and Dispositions in Security.—The following table shows the ways in which a title may be made up to a bond and disposition in security by the successor to a deceased creditor.[3]

I. Where Creditor held Unrecorded Bond or Unrecorded Assignation to a Recorded Bond.

(*a*) *Where Creditor died on or after* 31*st December* 1868, *and Executors are not excluded*—

(1) Executors nominate or dative duly confirmed;
(2) Disponees or assignees of such security under any deed or conveyance, *inter vivos* or *mortis causa*;
(3) Disponees or assignees of the moveable estate of such creditor under any such deed or conveyance;

or,

(4) Legatees of such security,

Complete title by

Notarial instrument recorded under Act of 1868, section 130, schedule (MM).

(*b*) *Where Creditor died prior to* 31*st December* 1868, *or Executors are excluded*—

(1) Disponee or assignee or legatee of such security under any deed or conveyance by him, *inter vivos* or *mortis causa*, or under any testamentary writing within the meaning of the 20th section of the Act of 1868;
(2) Disponee or assignee or legatee of the heritable estate of such creditor under any such deed or conveyance or testamentary deed or writing;

or,

1 *Baillie*, 2 Ross' L.C. 713.
2 31 & 32 Vict., c. 101, s. 150.
3 37 & 38 Vict., c. 94, ss. 61, 63, and 64; 31 & 32 Vict., c. 101, ss. 125, 126, 127, 128, 130.

(3) Heirs, after expeding general or special service,
Complete title by
Notarial instrument recorded under Act of 1868, section 130, schedule (MM).

II. Where Creditor dies Infeft in Bond, and Testate.

(a) *Where Executors are not excluded—*
(1) Executors-nominate duly confirmed ;
(2) Disponee or legatee of security ;
or,
(3) Disponee or legatee of moveable estate,
May complete title by
(1) Writ of acknowledgment by debtor recorded,—Act of 1874, section 63 ; Act of 1868, schedule (II) ;
or,
(2) Notarial instrument recorded under Act of 1874, section 64 ; Act of 1868, schedule (KK).

(b) *Where the Creditor died prior to 31st December 1868, or Executors are excluded—*
(1) Disponee of heritable estate generally
May complete title by
Notarial instrument under
(1) Act of 1874, section 64 ; Act of 1868, schedule (KK) ;
or,
(2) Act of 1868, section 19, schedule (L) ;
or,
(3) Act of 1874, section 53, schedule (N).
(2) Legatee
Completes title by
Notarial instrument under Act of 1874, section 64 ; Act of 1868, schedule (KK).

III. Where Creditor dies Infeft in Bond, and Intestate.

(a) *Where Executors are not excluded—*
Executors-dative duly confirmed
Complete title by
Notarial instrument recorded under Act of 1868, section 126, schedule (JJ).

(b) *Where Creditor died prior to 31st December 1868, or Executors are excluded—*
Heirs
May complete title by
(1) Notarial instrument (on extract decree of service, general or special) recorded under Act of 1868, section 128, schedule (JJ) ;
or,
(2) Writ of acknowledgment by debtor recorded under Act of 1874, section 63 ; Act of 1868, schedule (II).

An heir of provision under a destination in a heritable bond, even though it does not exclude executors, may complete his title by service.[1] Service as heir of provision under destination in bonds.

How Adjudgers make up Title to Bonds and Dispositions in Security.—An adjudger completes his title to heritable securities by recording the abbreviate of adjudication or an extract of it in the appropriate Register of Sasines.[2]

If what is adjudged is an unrecorded bond and disposition in security, or an unrecorded assignation of a bond and disposition in security, the adjudger should treat the decree in his favour as equivalent to an assignation of an unrecorded conveyance, and complete his title by expeding a notarial instrument narrating the unrecorded bond or assignation and deducing the decree in terms of section 23 of the Act of 1868.

Bonds of Corroboration and Dispositions in Security.—These deeds are used in practice in cases where interest in arrear is to be accumulated with the principal sum, or where additional subjects are to be disponed in security, or, it may be, where the heir of the debtor is willing to renew the personal obligation for repayment.

Bonds of Relief and Dispositions in Security.—These deeds are used to give real security in relief to persons who have undertaken cautionary obligations for the proprietors of land.[3]

Bonds of Annuity and Dispositions in Security.—The form of these deeds is, that the granters of them undertake to pay the annuity, and then dispone in security of their personal obligation certain lands, followed by the clauses of an ordinary bond and disposition in security, with these exceptions, that the granter does not usually either reserve power of redemption or confer on the annuitant power of sale.[4]

Securities over Entailed Estates. — Entails sometimes reserve power to the entailer, or to the heir in possession for the time being, to burden the entailed estate with debt to a

[1] *Hare*, 17 R. 105.

[2] 37 & 38 Vict., c. 94, s. 65, replacing 31 & 32 Vict., c. 101, s. 129.

[3] See Jur. Styles, vol. i. 319.

[4] Jur. Styles, vol. i. 322, for styles of bond of annuity and disposition in security and bonds of annuity by an heir of entail in favour of his wife in virtue of the powers contained in the Aberdeen Act.

certain amount by ordinary bond and disposition in security, or in some other way. In such a case, if a bond and disposition is granted, it will be similar to a bond by a fee-simple proprietor.[1]

Cash-Credit Bonds and Dispositions in Security.—It has already been shown that the Act 19 & 20 Vict., c. 91,[2] allowed proprietors of lands to pledge the same in security of cash accounts or credits, "provided always that the principal and interest which may become due upon such cash accounts or credits shall be limited to a certain definite sum to be specified in the security, the said definite sum not exceeding the amount of the principal sum and three years' interest thereon at the rate of five pounds *per centum*."[3] The cash-credit bond containing heritable security is similar in form to a cash-credit bond granted by the debtor and his cautioners, but has a disposition in security superadded.

Infeftment under cash-credit bond.

Cash-credit bonds are subject to the same rules as ordinary bonds and dispositions in security, with regard to infeftment, assignation, discharge, and the succession to the creditor.

IV. Absolute Dispositions Qualified by Back-Letters.

Term "absolute disposition."

The expression "absolute disposition" is generally applied to a disposition of heritable property, which conveys subjects *ex facie* absolutely to the disponee, although the object of the disponer and the disponee is that the disponee should in reality hold the subjects conditionally, *e.g.*, in security of a debt or for some other trust purpose. The disposition being *ex facie* absolute, the disponer can, under the Act 1696, c. 25, prove only by writ or oath of the disponee the terms on which the disposition was granted; and the practice, in the case of granting a disposition which is *ex facie* absolute, but in reality only in security or for some other purpose, is for the disponee to execute a separate writing, usually called a back-letter or back-bond, setting forth the conditions on which the subjects have been

Back-letters.

[1] See Jur. Styles, vol. i. 266, for form of bond and disposition in security by heir of entail in virtue of reserved powers; and p. 267 *et seq.* for securities over entailed estates in virtue of statutory powers.

[2] S. 7, renewing 54 Geo. III., c. 137, s. 14.

[3] See p. 318, *supra*.

conveyed to him.[1] This deed does not require to be probative.[2] The absolute disposition does not differ in form from an ordinary disposition of heritage, unless as regards the consideration in the narrative clause, which in the absolute disposition usually bears to be for certain onerous causes and considerations. The disponee under an absolute disposition takes infeftment in the lands conveyed to him in the same manner as a disponee under an ordinary disposition.[3]

Powers of disponee under absolute dispositions.

The disponee under an absolute disposition qualified by an unrecorded back-bond can sell or burden the subjects, and can give a valid title to purchasers or incumbrancers who transact with him on the faith of the records, although his doing so is in violation of the terms of an unrecorded back-letter granted by himself. The disponer's interest is reduced to a personal right against the disponee to have the estate, or the proceeds of its sale, as the case may be, reconveyed or paid to him, on payment or under deduction of the debts secured by the disposition.[4]

Effect of disponee's bankruptcy.

It was formerly thought that among the risks to which the granter of an *ex facie* absolute disposition qualified by an unrecorded back-bond was exposed was his disponee's bankruptcy; but, according to the decision of the House of Lords in the case of the *Heritable Reversionary Company, Limited*, v. *Millar*,[5] the trustee on a sequestrated estate of a disponee holding property in security under an *ex facie* absolute disposition qualified by a back-bond does not take the property absolutely, but only subject to the contract with the disponer, and with no greater rights than the disponee himself had.

Ex facie absolute disponee cannot poind.

The disponee under an absolute disposition, although qualified by an unrecorded back-bond, cannot poind the ground, because he is, feudally speaking, a proprietor, not a mere incumbrancer,[6] and although he can collect rents from tenants without resort

1 For forms of back-letters, see Jur. Styles (5th ed.), i. 421 *et seq.*, ii. 440 *et seq.*

2 *Seth*, 17 D. 1117.

3 See p. 68, *supra*.

4 See Lord Watson at 14 R. (H.L.) p. 3, in *National Bank*, 13 R. 380, rev. 14 R. (H.L.) 1; *Sommervails*, M. App. *voce* "Personal and Real," No. 3, rev. 5 Pat. 707; *Thomson*, M. 10,229.

5 18 R. 1166, rev. 19 R. (H.L.) 43; but compare *Mitchell*, M. 10,296; *Wylie*, M. 10,269.

6 *Scottish Heritable Security Company*, 3 R. 333.

to an action of maills and duties, his appropriate remedy for obtaining possession of the subjects conveyed to him, if the disponer himself is in possession, is an action of declarator and removing, not an action of summary ejection.[1]

Succession to disponee *ex facie* absolute.

Securities by way of absolute disposition, qualified by back-bond or back-letter, are heritable as regards the succession of the disponee,[2] for they do not fall under section 117 of the Act of 1868.

How disponer reinstated.

The only habile method for reinstating the disponer in his rights to the subjects conveyed by an *ex facie* absolute disposition is by granting to him a reconveyance.[3] While a disposition expressly in security can never become by prescription an absolute title,[4] possession for the prescriptive period on an *ex facie* absolute disposition gives a right of absolute property, and the rights under any relative unrecorded back-bond are cut down.[5] Again, where an absolute disposition is qualified by a back-bond, the disponer can confer the right of absolute property on the disponee by a discharge, or by destroying the back-bond,[6] whilst a discharge of the right of reversion under a heritable security by a debtor does not convert an *ex facie* security title into one of absolute property.[7]

For what debts disposition a security.

Securities constituted by absolute disposition qualified by back-bond are, as a rule, good to the extent of the value of the subjects for any debt incurred, whether before or after infeftment under the disposition,[8] inclusive of the expense of meliorations made by the disponee.[9] But the terms of the back-letter may oblige the creditor to reconvey on repayment of one specific debt.[10]

Effect of publication of back-bond.

If the back-bond (not a duplicate of it subsequently executed

[1] *Rankin*, 7 M. 126; *Scottish Property Investment Company*, 8 R. 737.

[2] 31 & 32 Vict., c. 101, s. 117 and s. 3 (10); and see *Stroyan*, 17 R. 1170.

[3] See Lord Fraser in *National Bank*, 13 R. at p. 400.

[4] Lord Braxfield in *Scott*, 3 Ross' L.C. 464; Lord Fraser in *National Bank*, *supra*, 13 R. at p. 400; and see *Chambers*, 2 S. 366.

[5] *Munro*, May 19, 1812, F.C.; *Paul*, Feb. 8, 1814, F.C.; *Chambers*, *supra*; and see *Smith*, 6 R. 794.

[6] See Lord Fraser in *National Bank of Scotland*, 13 R. at p. 400.

[7] *Miller*, Hume, 662.

[8] *Riddel*, M. 1154; *James*, 15 S. 12; *Maitland*, 6 S. 109; see Lord Fullerton in *Robertson*, 2 D. at p. 291; and *Brough's Crs.*, M. 2585; *Russell*, 7 S. 767, aff. 5 W. & S. 256; *Tierney*, 10 S. 664 *Balleny*, M. App. *voce* "Compensation," No. 5.

[9] *Nelson*, 1 R. 1093.

[10] See Lord Fullerton in *Robertson*, *supra*; and *Anderson's Tr.*, 36 S.L.R. 833.

by the absolute disponee for his own purposes)[1] is recorded in the appropriate Register of Sasines, the obligation to denude comes to have the force of a real limitation of the disponee's right.[2] The security will stand good for such sums at least[3] as were advanced prior to the date of the registration of the back-bond, when it is general in its terms. The judicial production of the back-bond, or a judicial demand for a reconveyance in terms of it, has the same effect as registration.[4] The recording or the judicial production of a back-bond specifying a sum for which the absolute disposition has been granted restricts the security to this amount, if so much has not then been advanced.[5]

Liability of *ex facie* absolute disponee to superior.

Notwithstanding an unrecorded back-bond, the disponee under an *ex facie* absolute disposition is bound to implement the conditions of the feu prestable by the superior against his vassal,[6] and this would appear to be the case even where the back-bond has been recorded,[7] that is to say, he is treated as a fiar in a question with the superior.

Questions between bondholder and absolute disponee.

In a question with a prior bondholder the holder of a security constituted by an *ex facie* absolute disposition is considered as a security holder merely, and not a proprietor.[8]

An absolute disponee's power to sell.

Although a heritable creditor under an absolute disposition and unrecorded back-bond can sell by either private bargain[9] or public roup, the Court may interdict a proposed sale by him, if the debtor can show that no prejudice will arise to the creditor by delay, and that prejudice or injustice may result to him from an immediate sale.[10]

1 *Scottish Heritable Security Co.*, 3 R. 333.
2 Bell's Prin. s. 912.
3 See Lord Justice-Clerk Moncreiff in *National Bank of Scotland*, 13 R. at p. 390.
4 *Keith*, Bell's Fol. Cases, 234; Bell's Prin. s. 912; Bell's Lect. ii. 1174; 2 Bell's Com. 223.
5 2 Bell's Com. 223; *Keith*, M. 1163.
6 *Clark*, 12 D. 1047; *Liquidators of City of Glasgow Bank*, 9 R. 689.
7 *Gardyne*, 13 D. 912, rev. 1 Macq. 358; and see also *M'Lelland*, 19 D. 574.
8 *Stewart*, 10 R. 102; *Liquidators of City of Glasgow Bank, supra.*
9 *Duncan*, 21 R. 37; *Baillie*, 12 R. 199; *Aiken and Tyre*, Hume, 551; *Park*, 7 R. 546; *Shrubb*, 5 S.L.T. No. 160.
10 *Lucas and Others*, 4 R. 194.

CHAPTER VII

LEASES

Definition. A LEASE, sometimes called a tack, has been defined as a contract of location (letting to hire), by which one person, called the lessor or landlord, grants, and another, called the tenant, or lessee, or tacksman, accepts, certain uses, current or definitive, or the entire control of lands or other heritages, for a period or periods, definite or indefinite, or even in perpetuity, in consideration of the delivery by the grantee of money or commodities, or both, periodically or in lump, or in both of these ways.[1]

Nature of lease. A lease is in essence a personal contract between the granter and the grantee thereof,[2] but, by the statute 1449, c. 18, and the Registration of Leases Act, 1857, certain leases confer real rights on the lessees to the extent of excluding singular successors of the granters from resuming possession of the subjects during the currency of the lease. From a conveyancing point of view, leases may be classified in two ways—(1) leases not subject to, and leases subject to, the Act 1449, c. 18; and (2) leases subject to the Registration of Leases Act, 1857.

I. LEASES NOT SUBJECT TO, AND LEASES SUBJECT TO, ACT 1449, c. 18.

Verbal lease:— A contract of lease, at least of any important subject, however short may be its endurance, is usually reduced to writing.

For year. But (1) leases for not more than a year may be proved *prout de*

For years. *jure*.[3] (2) Although verbal leases for a term of years may be resiled from before possession has followed on them, yet, where the lessees have entered into possession, such leases will be obligatory on both lessors and lessees for one year, either party

[1] See Rankine on Leases, p. 1.

[2] See, *e.g.*, *dicta* in *Stroyan*, 17 R. 1170.

[3] Bell's Prin. 1187.

being entitled to resile at the end of any year.[1] (3) Verbal leases for a period of years will be upheld against the granter and his heirs[2] provided (*a*) that the verbal bargain is proved by oath, and (*b*) that *rei interventus* has followed on the faith of the bargain and in pursuance of it. In such cases, although the bargain can be proved by writ or oath only, the acts constituting *rei interventus* can be proved *prout de jure*.[3]

For years followed by *rei interventus*.

Leases reduced to writing may be either valid against both the granters and their heirs and their singular successors, or valid against only the granters and their heirs. To be valid against singular successors as well as the granters and their heirs, leases must comply with the provisions of the statute 1449, c. 18. The essentials required by this Act, as interpreted by the decisions, for a lease binding on singular successors are these:—(1) The lease (when for more than one year)[4] must be in writing. (2) It must specify a definite term of endurance. (3) It must set forth a specific rent, which may be in money, grain, or services, but must not be elusory. (4) It must be followed by possession. (5) It must have as its subject-matter land or one of those adjuncts of land which are styled *fundo annexa*.

Leases valid against both granters and singular successors.

Essentials of a lease valid against singular successors.

Writing.

Leases should be embodied in probative writings; but if the lease, although informal or improbative, contains the essentials required by the statute, viz., a definite term of endurance and a stipulation for a rent, not elusory, it will be valid against singular successors as well as the granters, provided it has been followed (*a*) by possession, and (*b*) by *rei interventus*, if such possession[5] and *rei interventus*[6] are both ascribable to it. The essentials of a lease may be supplied by different writings.[7] An obligation to grant a lease *if required* will not bind a singular successor.[8] Holograph or tested obligations to grant a lease,

Informal or improbative writings followed by possession and *rei interventus*.

[1] *Keith*, M. 8400; *Neill*, Nov. 22, 1810, F.C.; and see Rankine on Leases, pp. 112–113.

[2] Not against singular successors, Bell's Prin. 1187.

[3] *Gowan's Trs.*, 24 D. 1382; *Allan*, 2 R. 587; *Walker*, 1 M. 417.

[4] See Rankine on Leases, p. 127.

[5] See *Duke of Hamilton*, 4 R. 328, 854, aff. 1878, 5 R. (H.L.) 69 (a case of no *consensus in idem*).

[6] *Sutherland's Tr.*, 16 R. 10; *Sellar*, 2 R. 381; *Wilson*, 3 R. 527; *Ballantine*, 8 R. 959; *Bell*, 10 R. 905; on possession as opposed to *rei interventus*, see Rankine on Leases, p. 122.

[7] See *Wilson*, *supra*.

[8] *Clerk*, M. 15,225.

or holograph or tested missives of lease, are equivalent to a formal lease in the sense of the statute. Although obligations to grant a lease or missives of lease are neither holograph nor tested, yet possession and *rei interventus* following on them will make them valid against both the granters and their singular successors.[1]

Parts and form of formal lease.

A formal lease is now generally bilateral in form, but a unilateral deed, containing all the essentials requisite to a lease, is also valid.[2] A lease of land in its simplest form consists of these parts:—(1) narrative clause; (2) letting clause; (3) description of subjects let; (4) period of endurance; (5) clause by lessor warranting lease; (6) obligation by lessee to pay rent; (7) obligation by lessee to remove at expiry of lease; (8) penalty clause; (9) clause consenting to registration for preservation and execution; and (10) testing clause.

Assignations.

Assignations of Leases; Subleases; and Renunciations of Leases, not falling under the Registration of Leases Act, 1857.—When a lease is assigned,[3] the deed of assignation makes over to the assignee the cedent's right to the lease from a certain time for the terms to run thereafter, with power to the assignee to possess the subjects, but under obligation to implement the prestations of the lease. The warrandice usually granted by the cedent is from all facts or deeds done or to be done by him in prejudice of the assignation.[4] A sublease is similar in form to a lease. By a sublease the principal tenant lets the subjects, warrants the sublease to the tenant, and the subtenant binds himself to pay to the principal tenant the rent.[5]

Subleases.

Difference in effect between assignation and sublease.

There is this difference in effect between an assignation to a lease and a sublease—that under an assignation the assignee becomes the proper debtor for the rent, the original tenant being entirely divested of the lease and of the right of possession, whereas under a sublease the original tenant continues bound to the landlord for the obligations in the lease, and is liable to fulfil the whole obligations of the sublease to the tenant there-

[1] Bell's Prin. s. 1190.

[2] *Burnet*, 14 S. 74.

[3] For the leases assignable, see H.R. 1018.

[4] For form of assignation, see Jur. Styles, i. 560.

[5] For form of sublease, see Jur. Styles, i. 558.

under. When a lease is terminated of consent before the expiry of the period specified in it, the agreement to do so is usually embodied in a written renunciation executed by the tenant, and accepted by the proprietor.[1] Renunciations.

II. Leases falling under the Registration of Leases Act, 1857.

The Registration of Leases Act, 1857,[2] had as its object the placing of long leases in as nearly as possible the same position as other land rights. Prior to the Act a lease could not be effectually used as a fund of credit, because there was no method of giving a creditor a real right except by ceding possession to him. Thus, in a leading case,[3] a tenant granted an assignation of his lease in security of a loan. The assignation was intimated to the landlord, but the tenant, to whom a sublease was granted by the creditor, remained in possession and paid the rent. The tenant became bankrupt, and it was held, in a question with the creditor and the trustee on the bankrupt estate of the tenant, that the assignation was not effectual against the trustee. It was said from the Bench that the transaction was plainly a device to create a latent security without change of possession either naturally, civilly, or symbolically, and was an attempt at variance with the first principles of the law of Scotland. The Act of 1857 changed the law to a very considerable extent by authorising the registration of certain leases and assignations in security of such leases, and making them valid without possession if registered. The Act provides that all leases registerable under the Act which would, under the law existing prior to the passing thereof,[4] have been effectual against any singular successor, shall, though not recorded, remain effectual against both granters and singular successors.[5] Object of the Act of 1857. Leases valid against singular successors before Act still valid.

The Act makes it competent to record in the appropriate Register of Sasines *probative* leases of lands and heritages in Scotland, whether executed before or after the passing of the Act, for a period of *thirty-one* years, or for any greater number To what leases the Act applies.

[1] For form of renunciation, see Jur. Styles, i. 562.

[2] 20 & 21 Vict., c. 26.

[3] *Brock*, 2 S. 52; rem. 3 W. & S. 75; adhered to, 8 S. 647; aff. 5 W. & S. 476.

[4] August 10, 1857.

[5] S. 2.

of years that shall be stipulated.[1] But the Act requires that, in leases executed after its passing of subjects which are not held by burgage tenure, there must, in order that such leases may fall under the provisions of the statute, be set forth (unless such leases have been executed in terms of an obligation to renew contained in a lease dated prior to the Act and renewable as after mentioned)[2] *the name* of the lands of which the subjects let consist or form a part, and *the extent* (which must not exceed fifty acres) of the subjects let, unless such subjects consist of mines and minerals.[3] With regard to the extent of land, the Act specially provides that land[4] not held by burgage tenure must, after the passing of the Act, not exceed fifty acres, in order that leases executed thereafter may fall under the Act, unless such leases have been or may be executed in terms of an obligation to renew contained in a lease dated prior to the Act.[5]

Obligations to renew leases.

Section 17 of the Act deals with obligations to renew leases, and enacts that leases containing an obligation upon the granter to renew the same from time to time at fixed periods, or upon the termination of a life or lives, or otherwise, shall be deemed leases within the meaning of the Act, and registerable as such, provided such leases shall by the terms of such obligation be renewable from time to time so as to endure for a period of thirty-one years or upwards.[6]

Summary.

To summarise the details of the preceding paragraphs, a lease, to fall within the provisions of the Act and to be registerable thereunder, must—

(1) *If executed before the passing of the Act, whether the subjects let are held by burgage or any other tenure*—

(*a*) Be probative; and

(*b*) Be for a period of not less than thirty-one years.

(2) *If executed after the passing of the Act, and the subjects let were, prior to the Conveyancing Act*, 1874, *held by burgage tenure*—

(*a*) Be probative; and

(*b*) Be for a period of not less than thirty-one years.

[1] S. 1.
[2] See next paragraph.
[3] S. 18.
[4] As opposed to mines and minerals.
[5] S. 18.
[6] S. 17.

(3) *If executed after the passing of the Act, and not executed in terms of an obligation to renew contained in a lease dated prior to the Act, and the tenure was, prior to* 1874, *not burgage*—

(*a*) Be probative;

(*b*) Be for a period of not less than thirty-one years;

(*c*) Set forth the name of the lands of which the subjects let consist or form a part;

(*d*) Set forth the extent of the subjects let (unless the subjects are mines or minerals), which extent must not exceed fifty acres.

Where leases registered.

The Act authorises the leases to which it applies to be recorded, when the subjects are held feu, in the General Register of Sasines, "or in the Particular Register of Sasines for the district in which the lands and heritages are situated," and, when the subjects are held burgage, in the appropriate Burgh Register.[1] The Particular Registers of Sasines for subjects held feu having been abolished, such leases must now, in the case of subjects held feu, be recorded in the appropriate division of the General Register of Sasines; and in the case of subjects which immediately prior to the operation of the Conveyancing Act, 1874, were held by burgage tenure, in the appropriate Burgh Register. To obviate the necessity of searches in both the General and the Particular Register of Sasines, the Act also provided that assignations and assignations in security of leases, and translations thereof, might be recorded in the register in which the leases themselves were recorded;[2] but the provision is now of no importance, in consequence of the abolition of the Particular Registers of Sasines.

Recording of extract.

When any lease registerable under the Act was, before the passing of the Act, recorded in the Books of Council and Session, or in the Books of any Sheriff, Commissary, or Burgh Court, an extract of the lease can be recorded. The recording of the extract is as effectual as the recording of the lease itself.[3]

Effect of registration.

Leases registerable under the Act, and valid as in a question

[1] S. 1.
[2] S. 1.
[3] S. 19, and 40 & 41 Vict., c. 36, ss. 1, 2.

with the granters thereof, which have been or shall be recorded at or subsequent to the date of entry stipulated in them, are, in virtue of their registration, effectual against any singular successor in the subjects let whose infeftment is posterior in date to the date of the registration.[1] The registration of leases registerable under the Act[2] completes the right under the same to the effect of establishing a preference in virtue thereof as effectually as if the grantee, or party in his right, had entered into the actual possession of the subjects leased at the date of registration thereof.[3]

Leases valid under Act.

Leases of the following kinds, if they are registerable under the Act and duly recorded, are valid against singular successors in virtue of the provisions of the Act, although they would not, under the Act 1449, c. 18, be so valid, viz. —(1) leases on which no possession has followed; (2) leases of indefinite duration, not less than thirty-one years; (3) leases in perpetuity; (4) leases in which the rent is elusory; and (5) leases in payment and security of debt.[4]

Assignations of recorded leases absolutely or in security.

The holder of a recorded long lease in the sense of the Act of 1857 can assign it, in whole or in part, either absolutely,[5] or in security[6] for payment of borrowed money, or of annuities, or of provisions to wives or children, or in security of cash-credits or other legal debt or obligation, but in accordance always with the conditions and stipulations of the lease. The registration in the appropriate Register of Sasines of an absolute assignation effectually vests the assignee thereunder with the right of the grantee thereof in the lease to the extent assigned,[7] and the registration of an assignation in security completes the right thereunder and constitutes a real security over the lease to the extent assigned.[8] The form of a bond and assignation in security of a lease given by the Act is not unlike that of an ordinary bond and disposition in security, and contains a

Form of bond and assignation.

[1] S. 2.

[2] As well as relative assignations, assignations in security, translations, adjudications, writs of acknowledgment, and notarial instruments,—s. 16.

[3] S. 16.

[4] Begg's Conveyancing Code, p. 434.

[5] S. 3; see schedule (A) for form of assignation of lease.

[6] S. 4; see schedule (B) for form of bond and assignation in security.

[7] S. 3.

[8] S. 4.

power of sale. Prior to 1894, a sale under a bond and assignation in security of a lease was carried through[1] according to the procedure prescribed for a sale under an ordinary bond and disposition by the Heritable Securities Act, 1847.[2] But the Heritable Securities Act, 1894,[3] provides that from and after the passing[4] of the Act the power of sale contained in bonds and assignations in security granted in terms of the Registration of Leases Act, 1857, may be exercised by adopting the procedure provided for sales under the powers of sale contained in bonds and dispositions in security by the Titles to Land Consolidation Act, 1868, the Conveyancing Act, 1874, and the Act itself; and that any sales under such bonds and assignations in security carried through by adopting this procedure shall be as valid in every respect as if they had been carried through in accordance with the provisions of the Registration of Leases Act, 1857. Sale.

Where neither of two assignees of a long lease had possession, it was held that the assignee who had duly completed his right by registration of his assignation fell to be preferred to a prior assignee whose title, although intimated to the landlord, was not recorded.[5] Competition between two assignees.

An *ex facie* absolute recorded assignation of a recorded lease, qualified by a back-letter, gives the right to the sum advanced to the creditor's executor, not his heir.[6] Recorded assignation and back-letter.

A creditor in a recorded assignation in security of a long lease is not entitled to poind the ground.[7] Poinding.

When a person who is not the original lessee (*e.g.*, an assignee, heir, or general disponee) has right to an unrecorded lease, or when a person who is not the original assignee has right to an unrecorded assignation in security, he requires, for the completion of his title, to expede a notarial instrument in the form of schedule (C) of the Act, and thereafter to record both the lease or the assignation in security and the notarial instrument.[8] The lease or the assignation in security will have a warrant of registration written on it, and the notarial instrument bears a How title completed in person of assignee, heir, or general disponee when lease or assignation in security not recorded.

1 S. 20.
2 10 & 11 Vict., c. 50.
3 57 & 58 Vict., c. 44, s. 14.
4 25th August 1894.
5 *Rodger*, 6 M. 24.
6 *Stroyan*, 17 R. 1170.
7 *Luke*, 23 R. 634.
8 S. 5.

docquet referring to the lease or the assignation in security. The instrument in the form of schedule (C) specifies shortly the lease or assignation in security, and the "writs or decreets" instructing the right of the person in whose favour the instrument is expede, with the dates thereof, and, if recorded, the register and date of recording. Appended to the schedule is a note to the effect that if the person in whose favour the instrument is taken is not the heir or disponee of the original grantee, but of one who has acquired right to the lease or assignation in security, the *series of titles* by which the predecessor acquired the right requires to be specified. As a rule, there is no difficulty in complying with the letter of the terms of the schedule. But it not infrequently happens that a person who could have made up a title to a lease either assigns his right to the lease, or dies before he has taken any steps to complete a title. Thus, if A, the original lessee under a long lease, died intestate, and B, his eldest son, assigned his right to the lease to C, it is thought that C can, without calling on B to take any step towards completing a title, make up a title to the lease by expeding a notarial instrument in the form of the schedule. In such a case the notarial instrument will specify (*a*) the lease in favour of A, and (*b*) the assignation by B in favour of C, and will bear that the assignation was granted by B, the eldest son and heir of A, and as such vested *jure sanguinis* in the right to the lease, A having died intestate.[1] If C happened to be the heir of B, and not his assignee, then the best way for C to complete a title to the lease is, it is suggested, to expede general service to B, and then to expede a notarial instrument specifying the lease and the extract decree of general service, and containing a statement to the effect that B, as heir of A, had right *jure sanguinis* to the lease. If the lease had not been recorded in favour of A, then C, in the case supposed, would record it and the notarial instrument; but if the lease had been recorded in favour of A, then C would record the notarial instrument. What has been said seems to follow from the fact that a lease has always vested *ipso jure*.[2]

[1] See Jur. Styles, i. 576.

[2] See Hendry's Styles, 336.

Translation of recorded assignations in security.

A recorded assignation in security under the Act of 1857 can be transferred, in whole or in part, by translation in the form of schedule (D) annexed to the Act, and the recording of the translation effectually vests the party in whose favour it is granted with the right of the granter in the assignation in security to the extent assigned.[1]

Creditor's rights of entering into possession under assignations in security.

The creditor or other party in right of an assignation in security is, without prejudice to the exercise of any power of sale contained in it, entitled, in default of payment of the capital sum for which it has been granted, or of a term's interest thereof, or of a term's annuity, for six months after such capital sum or term's interest or annuity has fallen due, to apply to the Sheriff for a warrant to enter into possession of the lands and heritages leased. On such application the Sheriff, after intimation to the lessee for the time being and to the landlord, shall, if he see cause, grant such warrant. The warrant is declared to be a sufficient title for the party in right of the assignation in security to enter into possession of the subjects contained in the lease, and to uplift the rents from any subtenants, and to sublet the same as freely and to the like effect as the lessee might have done. Nor does the creditor or other party in right of the assignation in security, unless and until he enters into possession under the warrant, render himself personally liable to the landlord in any of the obligations and prestations of the lease.[2]

How title may be completed to a recorded lease or a recorded assignation in security by (*a*) heir;

It is competent for the heir of any party who dies in right of a recorded lease or a recorded assignation in security to make up his title thereto either by recording *a writ of acknowledgment* in the form of schedule (E) of the Act, or, after having expede a general service, by recording a notarial instrument in the form of schedule (F) of the Act. Where the heir makes up a title to a recorded lease by means of a writ of acknowledgment, he gets the writ from the proprietor infeft in the subjects contained in the lease; and when he makes up a title to a recorded assignation in security, he gets the writ from the party appearing on the register as in absolute right of the lease of or

[1] S. 6. [2] S. 6.

over which such assignation has been granted.[1] No defect in the title of the proprietor or party granter of a writ of acknowledgment affects the right or title of the heir.[2] When an heir makes up a title by extract decree of service followed by notarial instrument, the service must now be general; for although section 8 of the Act allows service, special or general, that section, so far as it speaks of special service, has been repealed by the Statute Law Revision Act of 1892. A general disponee of a party who has died in right of a recorded lease or recorded assignation in security,[3] and a trustee on the sequestrated estate of a party having such a right,[4] can complete a title by recording a notarial instrument, also in the form of schedule (F) of the Act. When any adjudication of any recorded lease or recorded assignation in security has been obtained against the party vested in the right thereto, or against the heir of such party, the adjudger can make up a title by recording the abbreviate of adjudication in the register in which the lease is recorded.[5]

(*b*) general disponee; (*c*) trustee on sequestrated estate; (*d*) adjudger.

Modes of making up title by heir or general disponee where assignee has died without recording assignation or translation.

Where any assignation, assignation in security, or translation granted in pursuance of the Act has not been registered in the lifetime of the grantee under such writ, his heir (after general service) or general disponee can make up a title by recording a notarial instrument in the form of schedule (F), together with the assignation, or assignation in security, or translation, as the case may be.[6]

Preferences regulated by date of recording.

All leases executed after the passing of the Act, and all assignations, assignations in security of any recorded lease, and translations thereof, and all adjudications of recorded leases or assignations in security, are preferable according to their dates of recording.[7]

Renunciations and discharges of leases.

A renunciation of a recorded lease may be in the form of schedule (G) of the Act, and may be endorsed on the lease, and a discharge of any recorded assignation in security may be in the form of schedule (H), and may be endorsed on the assignation in security. Both renunciations and discharges can be recorded in the appropriate Register of Sasines.[8]

1 S. 7.
2 S. 7.
3 S. 8.
4 S. 11.
5 S. 10.
6 S. 9.
7 S. 12.
8 S. 13.

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